UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

EVERGREEN AMERICA CORP.

and **Case Nos.: 22-CA-25295**
22-CA-26087
22-RC-12215

LOCAL 1964, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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for the Charging Party.

DECISION

Statement of the Case

Steven Fish Administrative Law Judge: The trial with respect to the allegations in the above cases was held before me over the course of forty three (43) days between March 2, and September 24, 2004 in Newark, NJ and New York, NY. Numerous charges, amended charges, and complaints resulted in a Fourth Amended Complaint issued on March 2, 2004, which alleged that Evergreen America Corporation herein called Respondent or EGA violated Section 8(a)(1), and (3) of the Act. The unfair labor practice allegations were consolidated with a Report on Objections in Case No. 22-RC-12215 filed by Local 1964, International Longshoremen's Association, AFL-CIO, herein called the Union or the I. L. A. The complaint was also amended during the trial. Briefs have been received from Respondent and General Counsel, and Charging Party submitted a Memorandum. Additionally, General Counsel and Respondent have submitted reply briefs. All of these documents have been carefully considered.[1] Based

[1] Respondent in its reply brief, objected to the receipt of three Appendices, submitted by General Counsel. These documents were inadvertently omitted from General Counsel's brief, but were sent in subsequent to the receipt of the briefs. Inasmuch as Respondent has had full opportunity to and in fact did respond to the assertions made in the Appendices, I conclude that Respondent suffered no prejudice from the late filed attachments to General Counsel's brief. I therefore deny the request to reject the Appendices. Respondent also objects to the receipt of

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upon the entire record,[2] including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a corporation with offices and places of business in Morristown, New Jersey, Jersey City, New Jersey and in Port Newark and Elizabeth, New Jersey, as well as other locations throughout North America, where it has been engaged in the collection, transport and shipment of international freight.

During the preceding twelve months, Respondent derived gross revenues in excess of $50,000 from the transportation of freight from the state of New Jersey directly outside the state of New Jersey.

It is admitted and I so find that Respondent is and has been engaged in commerce within the meaning of Section 2(5), (6) and (7) of the Act.

It is also admitted and I so find that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. The 10b Issue

Respondent has alleged as an affirmative defense that certain allegations that appeared in the Fourth Amended Complaint should be dismissed because of Section 10(b) of the Act. In order to evaluate Respondent's defense, it is necessary to trace the charges, amended charges and complaints, that lead to the final document, which contains according to Respondent, certain untimely allegations which must be dismissed.

The initial charge in Case No. 22-CA-25295 was filed by the Union on July 19, 2002,[3] and alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act, by refusing to recognize and bargain with the Union, and by engaging in an "over aggressive campaign to restrain, coerce and intimidate its office clerical employees calculated to discourage their membership and interests in Local 1964 and to irreparably undermine their free choice in the election conducted by the Board on July 17, 2002. [4]

On December 31, 2002, the Region issued a Complaint and Notice of Hearing, alleging that Respondent violated Sections 8(a)(1) and (3) of the Act by unlawfully interrogating

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Charging Party's brief, since it contains no page or line citations, and is essentially argument by Charging Party. Respondent's request is rejected as being without merit.

[2] On July 15, 2005, the parties submitted a joint motion to me, to supplement and correct the record, with respect to the inclusion and exclusion of exhibits. I have reviewed the motion, and have complied with the parties agreement by making sure that exhibits in the record correctly reflects the understanding of the parties. I shall also include the Joint Motion in the record as Joint Exhibit No. 1, which also includes letters agreeing to the motion signed by all parties, as well as the Indices of the Exhibits.

[3] All dates hereinafter referred to are in 2002, unless otherwise indicated.

[4] The election results were 61 "NO", 52 "YES" and 115 eligible voters. The Union filed timely Objections on 7/23/02.

employees, threatening them with plant closure, granting excessive wage increases, promoting an excessive number of employees, and liberalizing its attendance policy and its dress code. The complaint did not contain an allegation that Respondent refused to recognize or bargain with the Union or that it violated Section 8(a)(1) and (5) of the Act or that a bargaining order is warranted.

On February 14, 2003, the Director issued a Report on Objections, in case No. 22-RC-12215, a First Amended Complaint in Case No. 22-CA-25295, and an Order Consolidating the above cases for trial. The Amended Complaint added allegations of solicitation of grievances, which were not included in the initial complaint, and specified in greater detail the allegations of unlawful interrogations and threats.[5] The Amended Complaint also did not contain an 8(a)(5) violation or a bargaining order request.

On April 28, 2003, the Union filed a charge in Case No. 22-CA-25745 alleging that Respondent violated Section 8(a)(1), (3) and (5) of the Act by various actions since July 17, 2002 the day of the election, such as changing terms and conditions of employment, including retirement, sick leave, attendance, dress and transfer policies, and annual bonuses. The charge once again asks for a bargaining order as a remedy. This charge was investigated by the Region. Respondent submitted a position paper in that case, responding to the allegations, wherein it raised a number of defenses and issues, including the assertion that a number of the changes alleged in the charge were made more than 6 months before the April 28, 2003 date of the charge, and were untimely under Section 10(b) of the Act.

On or about June 30, 2003, the Union filed a First Amended Charge in Case No. 22-CA-25745. This amended charge was nearly identical to the first charge in 22-CA-25745, except that it included some additional alleged changes, such as funeral and marriage leave policies.

At some point undisclosed by the record, the Region determined, as asserted by Respondent in its position statement that some of the Acts alleged in 22-CA-25745 occurred more than six months before that charge was filed. The Region therefore requested that the Union withdraw the charges in that case, and decided to include the allegations in that charge found to have merit, as part of Case No. 22-CA-25295, which was timely filed.

On August 8, 2003 the Union filed a request to withdraw the charge in 22-CA-25745, which was approved by the Acting Director on August 12, 2003.

On or about August 11, 2003, the Union filed an Amended Charge to Case No. 22-CA-25295, alleging that Respondent has since the election changed terms and conditions of employment (as it alleged in Case No. 22-CA-25745 which it requested withdrawal of in the same covering letter to the Respondent wherein it submitted its Amended Charge in 22-CA-25295), in various respects, that further demonstrates the futility of having another election, and justifies a request for a bargaining order.

On October 31, 2003, the Union filed a charge in Case No. 22-CA-26087, alleging that on October 28, 2003, Respondent discharged Michael Gunshefski because of his activities on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act.

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[5] Thus the initial complaint merely alleged that the Respondent "beginning in April 2002," interrogated and threatened employees with plant closure. The Amended Complaint detailed with more specificity the dates and supervisors involved in these incidents.

On November 25, 2003, the Region issued a Second Amended Complaint. This complaint included, in addition to the same 8(a)(1) violations alleged in the First Amended Complaint, nine allegations relating to Post Election conduct. These new allegations include, since July 17, 2002, Respondent promoted an unusually high number of clerical employees, since July 19, 2002, Respondent liberalized its dress code by instituting a summer casual dress policy, since on or about August 29, 2002, liberalized its dress policy to permit year-round casual dress, [6] on or about October 3, 2002, Respondent announced improved sick leave benefits, on or about November 5, 2002, Respondent announced early retirement incentives, in or around December 2002, announced a change in its holiday party policy to permit the attendance of spouses, on or about December 21, 2002, announced the grant of Christmas gift certificates, Respondent announced employees could elect to take Good Friday as a holiday, instead of the regular company holiday on Martin Luther King day, and on or about July 1, 2003 Respondent granted an unusually high wage increase to a large number of clerical employees.[7]

Additionally, the Second Amended Complaint alleged that since June 2002 Respondent sponsored employee lunches and picnics at its Morristown facility, restaurants and area recreational facilities. The prior complaints had made no allegations concerning lunches, picnics or restaurants. The Second Amended complaint also included another pre election allegation, that Respondent instituted a policy posting job opportunities on an electronic bulletin board, on or about June 11, 2002, which allegation also had not been included in the prior complaints.[8]

Finally, the Second Amended Complaint, included for the first time allegations that the Union had been designated as the collective bargaining representative by a majority of employees in an appropriate unit, and that the unfair labor practices committed by Respondent are so serious that a bargaining order is required.

On or about February 3, 2004, the Union filed a Second Amended charge to Case No. 22-CA-25745, although the Union had withdrawn that charge previously. The Union's attorney explained that he made an error by including the Case No. 22-CA-25745, while he meant to amend Case No. 22-CA-25295. This amended charge made the same allegations of post election changes made in its withdrawn charge, and added a new allegation that Respondent on January 22, 2004 announced, inaugurated and conducted at its Jersey City location, "an elaborate unprecedented party in celebration of the Chinese Luna New Year."

On February 12, 2004, the Director issued a Third Amended Complaint. This complaint was virtually identical to the Second Amended Complaint, except that it added two additional allegations, that on November 26, 2003 Respondent hosted a Thanksgiving luncheon at its Jersey City facility, and on January 22, 2004, hosted a Chinese New Year's party at its Jersey City facility, in order to discourage employee support for the Union.[9]

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[6] I note that the prior complaints alleged that Respondent since July 1, 2002 "liberalized its dress code."

[7] I note that the prior complaints alleged that on July 1, 2002 Respondent granted unusually high wage increases to its clerical employees.

[8] The complaint alleges that Respondent made all of the above changes "to discourage employee support for the Union."

[9] The Third Amended Complaint alleged as did the Second Amended Complaint described above, that numerous pre and post election changes by Respondent, discouraged "employees support for the Union."

The Third Amended Complaint made no reference to Case No. 22-CA-25745, or the amended charges filed by the Union in that case. Instead the Compliant in paragraph 1, incorrectly asserted that "the Second Amended charge in this proceeding[10] was filed by the Union on February 3, 2004."

On March 2, 2004, the Region issued a Fourth Amended Complaint and Order Consolidating Cases, wherein Case No. 22-CA-26087 was consolidated with Case Nos. 22-CA-25295 and 29-RC-12215, and adding an allegation that the discharge of Michael Gunshefski on October 28, 2003, because he joined and assisted the Union violated Section 8(a)(1) and (3). In all other respects, the Fourth Amended Complaint repeated the allegations made in the Third Amended Complaint, including the numerous changes in conditions of employment, described as "the granting of.....benefits", both pre and post election. The latter Complaint also made no reference to the charges in 22-CA-25745, and also incorrectly asserted that the Union filed a Second Amended charge in Case No. 22-CA-25295 on February 3, 2004, and a copy was served by regular mail on Respondent on February 5, 2004.

During the course of the trial, on July 26, after it was discovered that the Union had sought to amend a withdrawn charge, I granted General Counsel's motion to delete paragraph 1(c) of the Fourth Amended Complaint, which alleges that the Union sought to amend Case No. 22-CA-25295. General Counsel stated further that 22-CA-25745 is considered a closed case, and no further action was taken with respect to that charge, even after the Union sought to amend it on February 3, 2004. However, General Counsel concedes, as the record discloses, that allegations were included in the complaint that were raised in the amended charge to Case No. 22-CA-25745, but asserts that these allegations "are within the ambit of the charges in 22-CA-25295."

Respondent has filed an amended answer to the Fourth Amended Complaint, wherein it alleges as an affirmative defense that the allegations contained in paragraph 7(B)[11] and 7(F-P) (post election alleged grants of benefits, including the Thanksgiving luncheon and Chinese New Year's party) are barred by 10(b) of the Act.. The amended answer also asserted that paragraph 15(A) which alleges that since June of 2002, (pre election), Respondent sponsored employee lunches and picnics at its facility, and at area restaurants and recreational facilities are also time barred.

Respondent argues initially that the post-election allegations were raised in the charge filed in Case No. 22-CA-25745, filed on April 28, 2003, and that the allegations involved were investigated in that case, including receipt of a position statement by Respondent, wherein a 10(b) defense was raised to some of the allegations. The Region therefore decided to solicit a withdrawal from the Union of this charge, and to include the post election allegations in the Amended Complaint issued on November 25, 2003, based upon the timely filed charge in Case No. 22-CA-25295. [12]

Further confusing the matter, the Union filed a Second Amended charge in Case No. 22-CA-25745 (although that case had been withdrawn) on February 3, 2004, to allege an

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[10] This proceeding referred to Case No. 22-CA-25295.

[11] Paragraph 7(B) involves additional alleged instances of unlawful interrogation by Thomas Chen in August and September of 2002.

[12] The Union also filed an amended charge detailing post election conduct, to Case No. 22-CA-25295 on August 11, 2003, which the Region also included as part of the Second Amended Complaint.

additional instance of "an elaborate and unprecedented party." The Union stated that it intended to this charge to be an amendment to 22-CA-25295, but it was inadvertently mislabeled with the wrong case number.

Nonetheless, the Region issued a Third and eventually a Fourth Amended Complaint, wherein it included post election conduct that the Union had referred to in its amended charges, including the mislabeled charge detailed above.

Based on these facts, Respondent asserts that all the post election conduct alleged in the Fourth Amended Complaint must be considered as barred by Section 10(b), since they all arise out of a charge that was withdrawn, because that charge was itself untimely. I disagree.

The issue to be decided is whether the post election conduct alleged in the complaint is "closely related" to a timely filed charge. That test is to be applied, without regard to whether another charge encompassing the untimely allegations has been withdrawn or dismissed. *Seton Co.,* 332 NLRB 979, 983 (2000); *Redd-I Inc.,* 290 NLRB 1115, 1116 (1988). Therefore I conclude that the fact that the withdrawn charge in Case No. 22-CA-25745 encompassed these allegations is irrelevant. It is also not material that the Union's amended charges in Case No. 22-CA-25295, which re-alleges this conduct was also filed outside the 10(b) period. I agree with Respondent that these untimely amended charges, cannot serve to resolve the 10(b) issue, since these amended charges are also time barred.

Therefore, the determinative issue, as related above, is whether the complaint allegations that Respondent claims are time barred, are "closely related" to the timely filed charge in Case No. 22-CA-25295. There is a three-factor test used by the Board to resolve this issue; (1) whether the otherwise untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or series of events; and (3) whether the Respondent would raise similar defenses to both allegations. *Precision Concrete,* 337 NLRB 211 (2001); *Redd-I, supra; Reebie Storage & Moving Co.,* 313 NLRB 510, 511-512 (1993).

In my view, all three of these factors are present here. The timely charge filed by the Union, alleges that Respondent refused to recognize and bargain with the Union, and engaged "in an over-aggressive campaign to restrain, coerce and intimidate its office clerical employees calculated to discourage their membership and interests in Local 1964 and to irreparably undermine free choice in an election conducted by the Board." The charge also specifically requests a bargaining order as a remedy. Thus this charge is clearly broad enough to encompass the untimely allegations. The thrust of the Union's charge, as well as subsequent complaints, is that Respondent engaged in numerous acts designed to destroy the Union's majority status. The post election events are clearly alleged to be but a continuation of Respondent's conduct in discouraging employees' interest in the Union, precluding their free choice, and warranting a bargaining order. Therefore, the post and pre election events are based on the same legal theory.

As to the second prong, I find that the allegations involve similar conduct, during the same time period, and with a similar object, i.e. Respondent's efforts to resist the Union's campaign. *Ross Stores, Inc.,* 329 NLRB 573, 574 –75 (1999), enf. denied in pertinent part 235 F.3d 669 (D.C. Cir. 2001); *Seton Co., supra.; Redd-I, supra.*

In this regard, Respondent relies on Court cases rejecting the Board's attempts to find "closely related" conduct based upon the fact that the acts involve the same anti-union campaign. *Tic-The Industrial Co., Southeast,* 126 F.3d 334, 339 (D.C. Cir. 1997). However I as

an Administrative Law Judge am bound by Board law, as expressed in *Ross Stores* and *Redd-I, supra.*

Moreover, the D.C. Court of appeals has held that proof of a pattern of conduct cannot be satisfied solely (emphasis supplied) on the basis that the separate alleged acts arise out of the same anti-union campaign. *Precision Concrete, supra,* distinguishing *Ross Stores, supra* at 235 F.3d 669, on that basis. Here as in *Precision Concrete, supra,* I find that the closely related test is met, not "solely" based on the fact that the acts are part of the same anti-union campaign. The allegations involve similar conduct occurring within a common sequence of events in a half-year time span. *Precision Concrete, supra* at 212.

Respondent's distinction between pre and post election events is not determinative. All of the acts of Respondent both before and after the election were alleged to have a similar purpose of destroying the Union's majority status, and making a free and fair election impossible. I note in this regard that the initial complaint filed by the Region on December 31, 2002, although it did not request a bargaining order, did include a number of violations of Section 8(a)(1) of the Act, including threats, interrogations, promotions of excessive number of employees, granting of an excessive wage increase, liberalizing its attendance policy and liberalizing its dress code, all allegedly to dissuade its employees from continuing their support for the Union. Notably, Respondent does not argue that these allegations are not encompassed by the charge, even though the charge does not specifically mention any of these acts. It is also significant that the complaint, filed on December 31, 2002, which gives Respondent notice that the Union and the Board were alleging that its wage increases, promotions, and liberalizing policies to dissuade employees from supporting the Union, was within the 10(b) period for these allegations, as well as for the post election conduct, included in subsequent complaints. It is also significant that a number of the post election allegations are similar to these complaint allegations, which Respondent concedes are not time bared and are encompassed by the charge on file. Thus, the initial complaint alleged that Respondent on July 1, granted excessive wage increases to a large number of clerical employees and promoted an excessive number of such employees. The Fourth Amended complaint re-alleges these allegations, but adds allegations that since July 17, 2002 Respondent promoted an unusually high number of clerical employees, and on July 1, 2003 granted unusually high wage increases to such employees. Therefore the post and pre election allegations are virtually identical except for the time period. Similarly, the initial complaint alleges that Respondent on or about July 1, 2002 liberalized its attendance policy and dress code to dissuade its employees from continuing their support for the Union. In the final complaint, the allegation with respect to attendance policy was changed to read that it occurred on June 11. The liberalization of the dress code allegation was changed in the final complaint by including two paragraphs dealing with this issue, and alleging liberalization by instituting a summer casual dress policy on July 19 and permitting year round casual dress on August 29.

The remaining post election allegations, deal with other grants of benefits, such as improved sick leave, early retirement incentives, changes in holiday party policy, granting of Christmas gift certificates, and the holding of luncheons and parties, all with the identical purpose of discouraging employees from supporting the Union. It is clear that these post election events are closely related to pre election events, concerning which Respondent does not question.

Interestingly, in this regard Respondent does assert in its amended answer that the paragraph in the final complaint alleging that since June of 2002, Respondent sponsored employee lunches and picnics at its facility, restaurants and recreational facilities, is time barred under Section 10(b). This assertion is somewhat puzzling, since it is inconsistent with

Respondent's position that the crucial distinction for "closely related" analysis is between pre and post election conduct. In any event I reject Respondent's contention with respect to this paragraph of the complaint, since I find it to be "closely related" to the charge, as well as to the allegations in the initial complaint.

Respondent also argues that paragraph 7(b) of the final complaint is time barred, since it alleges that Chen interrogated employees in August and September. Since I have rejected Respondent's assertion that there is any meaningful distinctions, for 10(b) purposes between post and pre election conduct, I reject Respondent's contention with respect to this allegation, and find it to be closely related to the charge and the initial complaint which was filed within the 10(b) period with respect to this allegation of interrogation.[13]

Finally, with respect to the Third prong of the "closely related" analysis, it is clear that the defenses to the pre and post election conduct by Respondent are virtually the same. The allegations with respect to the excessive wage increases and promotions are identical, except for the time periods, that involve the same issues of whether Respondent engaged in such conduct to discourage Union supporters, or because of other business related reasons. The evidence concerning Respondent's financial condition, its competitive position, its turn over, and its decision to grant these benefits company wide is identical to both pre and post election conduct. Similarly, with respect to the other alleged changes in benefits, the defenses are essentially the same, i.e. whether the actions constituted a change in prior policy and/or whether they were motivated by a desire to discourage union support. Once again the fact that these changes, (if the conduct constitutes a change), were made nationwide is a part of Respondent's defense for all of the allegations. Accordingly, based on the foregoing, I reject Respondent's assertions that any of the allegations are barred by Section 10(b) of the Act.

III. The Position Papers

Respondent submitted two position papers to the Region, in connection with the investigation of the objections and the unfair labor practice charges filed by the Union. The first position paper, dated July 2002, makes reference to the representation case number, and sets forth Respondent's position with respect to the objections filed, including arguments concerning Respondent's grant of a wage increase.[14] On August 20, Respondent filed an additional position paper, dealing with the post election issues raised in the Union's charges.

At the trial, I received in evidence, over the objections of Respondent, both of these position papers. However, I brought to the attention of the parties, *Kaiser Aluminum & Chemical,* 339 NLRB 29 (2001), and asked the parties to brief, whether *Kaiser Aluminum,* changes long standing Board precedent that receives and relies on position papers filed by

[13] I note that the first Complaint alleged that Respondent beginning in April 2002 and continuing thereafter, interrogated its employees regarding their Union sympathies. Therefore, this complaint allegation is broad enough by itself to encompass the alleged interrogations by Chen in August and September.

[14] The unfair labor practice charge filed by the Union in July was also under investigation at the time. It is clear that the wage increase was also alleged by the Union as an unfair labor practice, and that the Region considered Respondent's position and arguments detailed in this position paper, in evaluating the wage increase as an unfair labor practice, as well as its position on the objections. Indeed the Region's Objections Report merely referred to the unfair labor practice complaint filed, and consolidated the representation case with the ULP cases.

Respondents.[15]

On September 7, 2001 the Board issued an unpublished order in *Kaiser Aluminum & Chemical Corp.,* reversing the ruling of the ALJ to admit into evidence a position paper submitted by the Charging Party. The Board based on the request of the Charging Party, published the previously issued order on July 25, 2003. The Board concluded that the position paper submitted by Charging Party was exempt from subpoena, because it was attorney work product as reflected in Rule 26(b)3 of the FRCP, and that Charging Party did not waive the work product privilege by submitting such a position paper to General Counsel.

Surprisingly, the Board's Order made no reference to the long standing Board precedent that admitted position papers submitted by Respondents to the General Counsel. Nor did the Board make any attempt to distinguish or reconcile this precedent with its decision to revoke the subpoena served on Charging Party.

Subsequent to *Kaiser Aluminum* being published, it has not been cited or followed in any subsequent case. There have been a number of cases post *Kaiser Aluminum,* where position papers have been received by the ALJ, and the Board has affirmed the decision without commenting on the issue. *Smucker Co.,* 341 NLRB 10 ALJ slip op. p. 4 (2009); *Harris Roger's Corp.,* 344 NLRB 60 (2005).

In *Tarmac America, Inc.,* 342 NLRB 107 (2004), the ALJ received and relied on a position paper filed by a Respondent. (ALJ slip op. p. 3, fn.2). The Board in affirming the ALJ's decision, made specific reference to and relied on statements made by Respondent in its position paper. (slip op. p. 2). Further in *United Scrap Metal,* 344 NLRB #55, Slip Op P. 1-2, (2005), the Board specifically relied on a Respondent's position statement in establishing unit size and identity of unit employees, and cited several prior Board cases, relying on position statements as admissions. *Navigator Communications Systems,* 331 NLRB 1056, 1058 fn 10 (2000); *McKenzie Engineering, supra; Hogan Masonry,* 319 NLRB 332, 333 fn 1 (1994).

However, I note that *Kaiser Aluminum* is not cited or distinguished in any of these cases, so it may very well be, that no one raised or saw the issue of a possible inconsistency between *Kaiser Aluminum* and the well established Board precedent to receive and rely upon position papers filed by Respondents. Interestingly, in *Fairfield Tower Condominium Association,* 343 NLRB No. 101 (2004), the ALJ received and relied upon a position paper filed by a Respondent Employer. (ALJ slip op. p.6). The Board while affirming the ALJ's finding that the subcontracting involved was permanent, noted that the ALJ's finding in that regard was based on Respondent's admission to that effect in a position paper. The Board observed that Respondent did not file a specific exception to this finding. The Board then goes on to affirm the finding, but cited some additional reasons, other than the admission in the position paper supporting that conclusion. This suggests to me that while no one raised *Kaiser Aluminum* as possibly affecting the conclusion as to the admissibility of the position paper, that someone at the Board level in that case realized a possible inconsistency between *Kaiser Aluminum,* and prior precedent, and made it a point not to rely on the position paper filed in that case.

[15] *Mackenzie Engineering,* 326 NLRB 473, 485, fn. 6 (1998); *Black Entertainment Television,* 324 NLRB 1161 (1997); *Massailon Hospital Association,* 282 NLRB 675 fn. 5 (1987); *Florida Steel Co.,* 235 NLRB 1010, 1011, 1012 (1978); *Steven Aloi Ford,* 179 NLRB 229, fn. 2 (1969).

General Counsel here argues that there is no inconsistency between *Kaiser Aluminum,* and prior precedent, since even if a position paper filed by Respondent is considered to be attorney work product, that Respondent waived the privilege by submitting the position paper to the Region. General Counsel's position is supported by numerous Court of Appeals cases. In *Columbia / HCA Healthcare Corp.,* 290 F.3d 289, 305-306 (6th Cir. 2002): In *Steinhardt Partners,* 9 F. 3d 230, 235-236 (2nd Cir. 1993); *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F. 2d 1414, 1428-1431 (3rd Cir. 1991); In *Chrysler Motors Corp.,* 860 F. 2d 844-846 (8th Cir. 1988).

The basis for these decisions is that since the work product doctrine's purpose is to promote the adversary system by protecting the confidentiality of papers prepared by attorneys in anticipation of litigation, the privilege is waived when the work product is voluntarily disclosed to an adversary or potential adversary, such as a government agency investigating the party asserting the privilege.

As the Third Circuit in *Westinghouse Electric, supra.* has stated:

> When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well founded allegations.) These objectives, however rational, are foreign to the objectives underlying, the work-product doctrine. *Id.* at 1429. *Accord Columbia Healthcare, supra,* at 305 – 306.

These cases provide ample justification for the Board's well settled precedent to receive and rely on position papers filed by Respondent's.

However, they do not expressly answer the possible inconsistency with *Kaiser Aluminum.* In that regard, General Counsel argues that there is no inconsistency, since Charging Parties are not potential adversaries to the Region, and therefore the privilege is not waived. General Counsel notes that in the event complaint issues, the Charging Party and General Counsel, are on the same side, and are not adversaries, and in such circumstances the privilege is preserved and not waived. *Castle v. Sangamo Western Inc.,* 744 F. 2d 1464 (11th Cir. 1984) (Private plaintiff's attorney did not waive work product privilege by disclosing documents to the government when private suit was consolidated with EEOC enforcement action). See also, *United States v. AT&T Co.,* 642 F.2d 1285, 1296 (D.C. Cir. 1980). (No waiver of work product privilege by private party disclosing information to DOJ in Anti Trust case, held that parties "anticipated litigation" against common adversary.)

Respondent argues that *Kaiser Aluminum* represents a "wholesale overruling" of prior cases allowing position statements to be used as evidence. It also asserts that a Charging Party is a "potential adversary" to the Region, since if the charge is dismissed, Charging Party can appeal this dismissal. It further notes that it is not unusual for both an employer and a union to file charges against one another relating to the same set of facts, and notes that here, Respondent did file 8(b)(4) charges against the union in May and June of 2003.

Respondent further argues that its position papers were submitted in connection with the objections in the representation case, which is recognized to be a non adversary proceeding. *Marion Manor for the Aged and Infirm,* 333 NLRB 1084 (2001).

With respect to Respondent's latter contention, while the position paper submitted in July (which is the document that General Counsel relies upon here) made reference only to the representation case, it is clear as I have noted above, that the wage increase issue discussed therein, was the subject of both an unfair labor practice charge and the objections. It is also clear, and I so conclude, that by submitting that document, Respondent was attempting to persuade the Region to dismiss the ULP charges as well as to dismiss the objections. Therefore, Respondent's reliance on the non-adversarial nature of representation proceedings is misplaced, and cannot provide support for its assertion that its position paper is protected from disclosure by the work product doctrine.

I cannot agree with Respondent's assertion that *Kaiser Aluminum* represents a "wholesale overruling" of prior precedent since the decision did not so state, and made no mention of position papers filed by Respondents.

General Counsel's distinction between Charging Party and Respondent's position papers, based on whether they are considered "adversaries" or potential adversaries to the General Counsel, may very well be valid, and the rationale for different rules concerning the admissibility of position papers in Board proceedings. I need not and do not decide that issue,[16] since as detailed above, Board cases, post *Kaiser Aluminum* continue to rely upon position papers filed by Respondents. *Tarmac America, supra; Smucker Co., supra; United Scrap Metal, supra.*

Accordingly I reaffirm my ruling to admit into evidence Respondent's position papers that it filed with the Region in connection with the investigation of the Union's charges and objections.

IV. The Union's Majority Status

Employees David Chiang and Wayne Ting are clerical employees who had been assigned to work for Respondent at Maher Terminal in Port Elizabeth, New Jersey. They began speaking to unionized employees employed at Maher Terminal about the possibility of organizing employees. Ting and Chiang were given the name of Harold Daggett of the International Longshoremen's Association to speak to. Before making an appointment to meet Daggett, Ting and Chiang ascertained from speaking to coworkers that there was interest in having a Union represent them. A meeting was arranged for late March with Daggett. Ting and Chiang told Daggett that the employees wanted to be represented by a Union because management treated them unfairly, and because employees were concerned about their job security. In this latter regard, Chiang had attended a management meeting, where management officials talked about bringing in an outside computer consultant to overhaul Respondent's computer system. Chiang interpreted these remarks as indicating an intent by Respondent to outsource work. Moreover, Respondent had also announced that it was transferring a small amount of work functions from its Morristown facility to its Charleston, South Carolina location. Daggett in turn, introduced the employees to Bob Levy, president of Local 1964 I. L. A., and a meeting was arranged for April 15, at the Holiday Inn, Elizabeth, New Jersey. Approximately 30-40 employees were present, including Ting and Chiang. Levy explained the organizing process and that he was going to distribute authorization cards to be

[16] *Cf.* In re *John Doe,* 662 F. 2d 1073, 1081-1082 (4th Cir. 1981). (Finding waiver of the work product privilege even where it was disclosed to a non-adversary, since in the circumstances there, the attorney could not reasonably expect to limit the future use of the otherwise protected material.)

signed by employees. These cards would authorize the Union to represent the employees, and the Union would need these cards signed by employees in order for the Union to move forward. Levy did not explain what he meant by "move forward", and did not mention an election at this meeting.

Authorization cards were distributed at this meeting, and some were signed and returned to Levy at the meeting. Blank cards were distributed to some employees present at the meeting, including Ting and Chiang to distribute to other employees. The employees thereafter formed an organizing committee, and cards were distributed to employees of Respondent, by organizing committee members, as well as by other employees who were not members of the organizing committee, but who had friends or colleagues who were interested in the Union.

As a result of this process, the Union was able to obtain 66 authorization cards from employees in the bargaining unit, eventually agreed upon the parties. The Union also obtained some cards from employees not included in the unit, such as sales employees, and port captains.[17]

The parties agreed on the second day of hearing that June 15, 2002 is the appropriate date for measuring majority status, and further stipulated that the Excelsior list for the July 17 election which set forth the names of employees in the unit eligible to vote, be used as the list of unit employees for determining majority status of the Union.

On April 15, 2004 more than halfway through its case, General Counsel sought to introduce a card signed after June 15. After Respondent objected, in part on that basis, General Counsel sought to withdraw from the stipulation, asserting that it could pick any date to establish its majority status, and was entitled to prove majority status at any subsequent time, if the record so establishes. I permitted General Counsel to withdraw from the stipulation, but admonished General Counsel that Respondent be informed of any alternative dates for measuring majority status and that General Counsel must establish which employees were in the unit on any alternative date. General Counsel indicated that it would introduce payroll records for any alternative date that it picks. On that basis, I allowed General Counsel to introduce some cards, signed after June 15. However, General Counsel never introduced any payroll records or any other evidence, as to the number of employees in the unit on any dates, other than June 15.

Respondent argues that the failure of General Counsel to establish a date on which the Union allegedly obtained a majority, combined with the prejudice suffered by Respondent from General Counsel's failure to do so, bars General Counsel from showing that the Union obtained majority status on any date. I disagree.

The record has established the number of employees in the unit as of June 15, and General Counsel is entitled to use that evidence to prove the number of employees in the unit on that date, notwithstanding its subsequent equivocal position on using that date, and its

[17] Initially the Union sought to include Port Captains in the unit. Subsequently the parties agreed to elections in two separate units. The Union won the election in the unit of Port Captains. Respondent contested the election by asserting that the Port Captains were supervisors. This contention was rejected by the Board and the Courts. After the Court of Appeals denied Respondent's appeal, Respondent commenced bargaining with the Union in the Port Captains unit, and after a strike, signed a collective bargaining agreement with the Union covering the Port Captains.

purported attempt to use cards signed after that date without proving unit composition on any other date. I see no prejudice towards Respondent from having to defend based on this date, since the case was litigated on that basis. Although General Counsel did argue that it would attempt to argue for the use of an alternative date, and never introduced any evidence to establish same, it never withdrew its assertion that the Union achieved majority status on June 15.

Therefore, I conclude that the June 15 date is the appropriate date to use for measurement of the Union's majority status, and that since there are 115 employees on that list, the Union needs to have obtained 58 cards in order to prove that it was represented by a majority of employees in the unit.

However, I do agree with Respondent that since General Counsel has failed to establish unit composition for any date other that June 15, that cards signed after that date, cannot be counted towards establishing the Union's majority status.

With respect to the cards introduced into the record, Respondent asserts that the testimony of Levy and the members of the organizing committee with respect to their authorization of cards was contradictory, conflicting and unreliable, and therefore insufficient to properly authenticate the cards that were introduced through them. In such circumstances, Respondent contends that where confusion exists concerning who collected the card, General Counsel must introduce credible evidence to eliminate such confusion. *First Legal Support Services,* 342 NLRB 29, slip op. at p.2 (2004).

Respondent relies upon the fact that the members of the Organizing Committee met on several occasions to discuss who had collected cards from which employees, and that they at various times submitted statements indicating conflicting numbers of cards that they allegedly received. Respondent contends that this evidence, plus a general lack of specific recollection by some of the witnesses, requires a finding that all cards, not authenticated by signers be rejected. Respondent argues that above infirmities in the testimony of the solicitors, required that General Counsel call all the card signers to clear up the confusion in the record about their cards. *First Legal, supra.* I cannot agree.

I do not find anything nefarious or improper about the Union's Organizing Committee having meetings to discuss issues of who obtained cards from which employees. I note that the issue of majority status became significant after the amended complaints were issued and General Counsel filed a petition in District Court seeking 10(j) relief. At that time it became necessary to establish majority status, and since over a year and a half had passed between the time that the cards were solicited, the meetings were held in early 2004 to sort out who had obtained what card. It is not unreasonable in such circumstances to have a meeting to discuss these issues, and to refresh the recollection of others as to these matters. I do not find that such meetings warrant a finding that their testimony concerning such matters should be summarily rejected, as Respondent contends. While there were some minor discrepancies between some of the statements prepared by the witnesses concerning their solicitation of cards and their testimony, I do not find them sufficient to entirely discredit such testimony, or to require General Counsel to call all the card signers to authenticate their cards.

I found members of the Organizing Committee and other employees who testified concerning card soliciting to be extremely credible and sincere. They were clearly reluctant to testify about these matters, since they had assured the employees when they solicited the cards that the cards would be confidential, and indeed the employees who signed were very concerned about having their signed cards disclosed to Respondent. Although as Respondent

points out, the Organizing Committee members were interested in obtaining a bargaining order in this proceeding, I do not believe that any of them were attempting to tailor their testimony to support that goal. Instead, I found that all of them were testifying truthfully to the best of their recollection, and their testimony was credible and believable.

I do not find as Respondent asserts, *First Legal Services,* to be dispositive as to this issue. There, unlike the cards in issue here, there was one disputed card, which unfortunately was crucial in determining majority status. That card was undated and was not an original. Moreover, General Counsel presented conflicting testimony from two different alleged solicitors, who allegedly obtained that card, in totally different circumstances. The Administrative Law Judge found that since the card was undated and a copy, the date of execution could not be fixed with any degree of certainty. Therefore the Administrative Law Judge essentially discredited both solicitors testimony, finding that the card "has too many infirmities to be regarded as trustworthy." He relied heavily on the card being undated and a copy, which coupled with the conflicting testimony of the solicitors, made it essential for General Counsel to call the signer or present other evidence, such as a date stamp, to authenticate that card. The Board agreed with the Administrative Law Judge, with Member Liebeman dissenting, that the card should not be counted and a bargaining order should not issue based in part as such a card. Those facts are a far cry from the cards here. All of the cards were dated or where the date was missing, testimony was offered to correct the omission. Also, there is no substantial evidence of direct contradictions between witnesses as to how specific cards were obtained. Therefore I cannot conclude, as Respondent suggests that the record establishes sufficient confusion about all cards, except for those authenticated by the signers themselves, to warrant a finding, under the principles of *First Legal Services,* that additional evidence is required to authenticate these cards. However, I shall be guided by *First Legal Services,* when evaluating the testimony offered concerning each card that General Counsel has introduced into the record.

David Chiang in addition to authenticating his own card, dated April 15, and signed at the Union meeting on that date, testified concerning the cards of Chun-Mei Huang, John Gunshefski, William Sung and Fanny Kong. Chiang testified that he gave cards to Huang, Sung and Kong, and observed each of them sign their cards.[18] Respondent makes no specific objection to these three cards, (other than the general objection that I have rejected above, that all cards introduced through solicitors not be counted), and I find these cards to have been validity authenticated, and shall count them, as well as Chiang's card.

Chiang testified that he handed a blank authorization to John Gunshefski at the end of lunch time. Gunshefski told Chiang that he wanted to take the card home and think it over. The next day, Chiang asked Gunshefski where the card was and whether he signed it. Gunshefski replied that he had mailed the card to the Union. Further, Michael Gunshefski, who is John Gunshefski's brother, testified that he received a signed card from his brother John, and they gave the card to Chiang. John Gunshefski, although called by General Counsel to testify about other issues, was not asked any questions about his card.

However, the card introduced into evidence is dated April 16, 2002, and on the other side, contains the date stamp from the Regional Office, dated June 4. Moreover, the back of the card contains another date stamp, which is not legible, plus some lines which indicate that the document was mailed, and processed by the Post Office.

[18] These cards are dated May 7, April 24 and April 29 respectively.

Respondent argues that the principles of *First Legal Services,* should be applied to this card, and that the failure of General Counsel to ask John Gunshefski to identify his card is fatal. While this card is questionable, in view of the failure to ask John Gunshefski about it, coupled with conflicting testimony from Michael Gunshefski and Chiang, I find contrary to Respondent that the record contains sufficient corroborating evidence as to this card. Thus unlike in *First Legal Services,* this card is dated April 16, and it is an original and not a copy. More importantly, it contains a date stamp from the Regional Office, dated June 4, which proves that it was signed prior to the crucial date of June 15. *J. P. Stevens,* 179 NLRB 254, 278 (1969); *Combined Metal Mfg.,* 133 NLRB 895 (1959). (Regional Office stamp proof that card signed on or before date of stamp.)

Therefore, based on the foregoing, I credit the testimony of Chiang and conclude that his testimony that he gave the card to Gunshefski, and that Gunshefski, the next day, told Chiang that he had mailed it in to the union, plus the additional evidence on the back of the card is sufficient to authenticate this card. Although the testimony that Gunshefski mailed in the card is hearsay, the Board will receive and rely on such testimony, where it is probative and corroborated by something more than the slightest amount of other evidence. *Dauman Pallet,* 314 NLRB 185, 186 (1994); *299 Lincoln Street,* 292 NLRB 172, 185 (1988). Moreover, unobjected to hearsay is admissible and probative. *299 Lincoln, supra.* Here Chiang's testimony that Gunshefski told him that he had mailed the card in is corroborated by the lines on the back from the Post Office, and was not objected to. I therefore rely on such evidence to find that this card has been validity authenticated.

I have considered the fact that General Counsel did not ask John Gunshefski about his card, although he was called as a witness to testify about other matters. However, since I have concluded that other evidence, as related above, constituted sufficient prima facie evidence of reliability of that card, it was not essential for General Counsel to ask Gunshefski to confirm that he signed his card. I note that Respondent had the opportunity to question John Gunshefski about his alleged signing a card and mailing it to the Union, but it chose not to do so. Accordingly, I will count John Gunshefski's card.

Wayne Ting in addition to authenticating his own card, dated April 15, also furnished testimony concerning the cards of Alice Chang, Jennifer Chen, Barbara Chi, Danny Chow, Colton Huang, William Leung, John Liu, Christine Lo, Juan Lou, Linda Cheng, Sam Wang, Jim Yang and Robert Tsai. Ting credibly testified that all thirteen of these individuals handed their completed cards to him. Respondent, other than its general objection to cards authenticated by solicitors which I have rejected above, specifically object to only two of the above cards, those of Yang and Tsai.[19] I therefore shall count the eleven cards to which Respondent has not objected.

Ting credibly testified that the card introduced into evidence as a card with the name Shu Te Tsai, was the card of Robert Tsai. Ting and Tsai discussed the card while in the men's room. They were in different stalls, since Tsai was afraid to be seen talking about the Union, and they decided to have discussions in that setting. After Ting answered Tsai's questions, Tsai handed Ting the signed card underneath the divider between the stalls. Respondent objects to

[19] All of these cards were either dated prior to June 15, or where undated, the record contains other evidence that they were signed prior to that date. For example, Chi's card was undated, but Chi authenticated her own card and testified that it was signed on April 16. Tsai's card is undated, but the Regional date stamp establishes that it was signed prior to the June 15 cut off.

the receipt of this card, because General Counsel failed to ask Ting whether Robert Tsai and Shu Te Tsai are the same person. In this regard, Respondent observes that the address on the Excelsior list for Tsai, Robert Shu Te is different than the address on the card, and argues that General Counsel has therefore not established that the signer of the card is the same person as on the Excelsior list. I do not agree.

I have credited the testimony of Ting that the card introduced was signed by "Robert Tsai," in the men's room and returned to Ting at that time. The fact that General Counsel failed to specifically ask Ting whether "Robert" Tsai is the same person as "Shu Te" Tsai is inconsequential, since I conclude that Ting implicitly so testified by identifying the card in question as signal by Robert Tsai. I do not find that the difference in address between the card and the Excelsior list to be significant, since it is reasonable to conclude that Tsai merely moved between signing his card and June 15. Moreover, an examination of the Excelsior list actually supports Ting's testimony. There is only one Tsai on the list, thereby making unlikely Respondent's implication that Robert and Shu Te Tsai are different people. Further, and most importantly, the Excelsior list refers to the individual as Tsai Robert Shu Te, supporting Ting's implicit testimony that they are in fact the same person. Therefore, I find that Tsai's card was validity authenticated.

Ting testified credibly that Jim Yang filled out and signed his card in Ting's presence and handed it back to Ting at that time. However, Ting did not testify about the conversation if any, between he and Yang when Yang signed his card. Frank Spano, Respondent's Manager of Human Resources, testified that on May 23, Yang came into his office "crying," and told Spano that there was Union organizing going on, that he had signed a card, and that he was upset about it and regretted that he had signed. Spano asked why Yang was upset. Yang replied that when he signed the card, he thought that it was for an election, and he had just been told that there isn't going to be an election. Spano replied that Yang should not worry about it, it's not something to be upset about, and to relax.

Respondent argues that since General Counsel never called Yang as a witness, or recalled Ting to ask him about his conversation with Yang at the time that Yang signed his card, that an inference should be drawn that Ting told Yang that the purpose of his card was to secure an election, and that therefore the card should not be counted. *Cumberland Shoe Corp.,* 144 NLRB 1268, 1227-78 (1963), *enfd.* 351 Fd.2 917 (6th Cir. 1969).

However, where as here, the card is a single purpose authorization card,[20] it will be counted unless it was proved that the employee was told that the card was to be used solely for the purpose of obtaining an election. *NLRB v. Gissel Packing,* 395 U.S. 575, 584 (1969); *DTR Industries,* 311 NLRB 833, 832-845 1993); *Levi Strauss & Co.,* 172 NLRB 712, 733-734 (1968); *Cumberland Shoe, supra.,* at 1269.

Statements made to employees that the card would or could be used to secure an election, or that an employee had a right to vote either way even though he signed the card, are not sufficient to foreclose the use of the card for the purpose designated on its face and to establish that it was signed solely for an election. *DTR, supra,* citing *General Steel Products,*157 NLRB 636 at 645; *Sheraton Hotel Waterbury,* 312 NLRB 297, 346 (1993).

[20] The card reads that the signer authorizes the Union "to represent me, and in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions."

Here, the best that can be said for Respondent's evidence, is to credit Spano's hearsay testimony and conclude that prior to signing his card he (Yang) believed that it was for election, and someone (not necessarily Ting) had so informed him. This evidence is far from sufficient under the above precedent to negate the clear purpose of the card's unambiguous authorization of the Union to represent him. Therefore, I shall count Yang's card as well.

Maria and Paolo Magbanua, are husband and wife and both members of the organizing committee, and both singly and collectively obtained a number of authorization cards from employees. All of the cards authenticated by these employees were either signed in the presence of the Magbanuas or handed to them by the signers, and were dated between April 15 and May 17. Respondent does not dispute any of the cards authenticated by the Magbanuas, with the exception of the cards of Virginia Huang, Marina Peda, Michael Kelly, and Paresha Shah.[21]

Accordingly, I find the cards of Maria and Paolo Magbanua, Jeannot Alexandre, Eslinde Acebal, Claire Connor, Mark Chu, Kamud Patel. Sandra Sukmanan, Sinthia Greene, Jennifer Comia and Allison Taylor, are valid and can be counted towards establishing the Union's majority.

With respect to the cards of Huang, Peda, Kelly and Shah, Maria Magbanua gave all four of these employees cards in an envelope. All four of them returned the envelopes to her, a few minutes after Magbanua had given them the envelope containing the card. When she received the envelopes the employees did not say anything to her other than "here," and Magbanua did not open the envelopes to see if there was a card inside.

However, she did give all the cards and envelopes that she collected to her husband Paolo. Paolo in turn, opened each of the envelopes, looked at the cards to make sure that everything was filled out, and then passed the cards on to Ting. Paolo also admitted that he filled out certain information on some cards, including the date on the cards of Kelly, as well as several others. The dates were filled in by Paolo on the dates that he received the cards, either from Maria in an envelope or directly from the employees.

Respondent argues that the cards of Huang, Peda, Kelly and Shah were not properly authenticated, inasmuch as neither Maria nor Paolo saw these employees sign their cards, and that Maria admitted that she did not open the envelopes, allegedly containing the cards, when she received the envelope from the employees.

However, I conclude, contrary to Respondent's contentions, that these cards were sufficiently authenticated. Maria Magbanua gave the employees authorization cards in an envelope, after a discussion with them about signing a card. Shortly thereafter she received back from the same employee an envelope. I believe that it is appropriate to draw an inference from these facts, absent any contradictory evidence, that the envelope contained a card that Maria had placed into the envelope, before handing it to the employee. It is not likely that the employee would give back the envelope to Maria and say "here", if the envelope was empty or something else was in it, or if for any reason the employee decided not to fill out the card.

Moreover, and most importantly, Paolo, to whom Maria gave the envelopes, opened them and confirmed that they contained cards, with signatures of the employees appearing on

[21] As noted above, Respondent also made general objection to all cards, which were not authenticated by the signer, a contention which I have rejected.

each card. This testimony of Paolo is more than sufficient to establish a sufficient chain of custody to validate these cards. The fact that Paolo admitted that he filled in the date, as well as other portions of Kelly's card, as well as that of other employees is not significant. It is well settled that, since the date of signing is established by credible testimony of the Magbanuas, the fact that portions of the cards, including the date, was filled out by someone other than the signer, does not invalidate these cards. *Sheraton Waterbury, supra* at 346; *Limpert Bus,* 276 NLRB 364, 368 (1985).

Accordingly, I conclude that all of the above cards, authenticated by the Magbanuas are valid for purposes of establishing the Union's majority status.

Barbara Chi received a phone call from Wayne Ting in the beginning of April. Ting asked her if she wanted to join a labor union. Chi replied that she wanted to join, but she was afraid, so she had to think about it. On April 16, at 5:45 PM after work in the cafeteria, Ting again asked Chi if she wanted to join the union. Chi replied that she really wanted it but was scared. She asked Ting if Respondent would find out if she signed. Ting responded that he would not let the company know and would keep it secret. Ting then handed Chi a blank card. She filled it out partially and signed it and returned it to Ting. She did not fill out the date, or her address. Ting told Chi at the time that she signed the card that there was going to be an election at Evergreen.[22] Chi gave the signed card back to Ting, who in turn gave it to the Union. The Union put a stamp on the card, reading April 17, 2002. The card also contained on the other side, the Region's June 4 date stamp. On June 25, 2002, Chi signed a one page statement, given to her by Ting, that she signed her card on April 16, but neglected to fill in the date at the time.

Shortly thereafter, Ting gave Chi blank authorization cards to distribute to some of her fellow employees. In that connection, a meeting was arranged at the home of Sherry Yao for April 28 on a Sunday. Yao had been told by another employee that the1964 Local is contacting employees and asked Yao if she was interested in joining that Union. Yao replied that she wanted to have a union to help employees in the company. She was told that someone would come and bring a card to her home. Chi contacted Yao and arranged for the meeting.

Michelle Shen had spoken to Chi and told Chi that she was interested in joining the Union. Chi informed Shen that she was meeting at Yao's home to get cards signed and Shen agreed to meet Chi at Yao's house.[23]

Chi met with Yao and Shen at Yao's home as arranged. She gave blank authorization cards to both employees. Chi told them that they needed to sign the cards to join the Union, and that the employees of Evergreen would vote about whether there would be a Union. Shen and Yao both read, filled out, signed and dated their cards. Shen's card was dated April 29 and Yao's card was dated April 28. They gave the signed cards to Chi, who in turn gave them to Ting.[24]

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[22] The record does not reflect whether Ting told this to Chi, before or after she signed the card.

[23] Yao and Shen lived near each other in Edison, New Jersey.

[24] Based on a compilation of the credited portions of the testimony of Yao, Shen and Chi. While there's some discrepancy between the testimony of the witnesses as to whether an election was mentioned on the date the cards were signed, I credit Yao that Chi did refer to an election as I have detailed above. While the record is unclear as whether the meeting and signings took place on April 28 or 29, I conclude that the correct date of the signing was April

Continued

Shen and Yao told Chi that they knew some fellow employees that might be interested in joining the Union. Chi gave each of them blank cards to distribute to other employees. Shen called Chris Yu on the phone from Yao's house and arranged for Chi to meet with Yu at Yu's house. Chi went to Yu's house which is also located in Edison, New Jersey on that same day. Chi gave Yu a card and asked her to sign if she wanted to join the Union. Yu read the card, signed it and filled out the card, but did not put in the date. Yu gave the signed card back to Chi. On June 25, Yu was given a statement to sign, reflecting that she signed her card on April 15. Yu signed that statement. However, on cross examination, Yu was unsure of the date that she signed, except she was sure that it was on a Sunday. The card contained a date stamp from the Union, dated April 16, 2002. The card also, on the other side, contained the date stamp from the Regional Office dated June 4, 2002. I conclude, although there is some uncertainty from Yu's testimony as to the date that the card was signed, that Chi's testimony that it was signed on the same day that Chi obtained cards from Shen, Yao and Huang is the more credible, and established the correct date of signing was April 28 and not April 15, as Yu testified. In any event, since the card contains the Region's date stamp on June 4, that evidence is sufficient to prove that the card was signed prior to June 15, and therefore was timely executed for majority purposes.

Since Stephanie Huang lived in the same Edison, New Jersey community as Shen and Yao, Chi met with Huang at Huang's home on the same April 28 date. David Chiang knowing that Chi was going to be in the area, had contacted Huang and arranged for Chi to meet with Huang on that day. Chi gave Huang a card at Huang's house on that day. Huang signed her card, dated April 28 and gave it back to Chi.

The next day, April 29, Chi placed the cards that she obtained that day in an envelope and put them in the glove compartment in her car in the parking lot. Pursuant to prior arrangement, Ting, who had been given the combination to Chi's car and glove compartment retrieved the cards.

That same day, April 29, Chi arranged to meet "Hetty" Shih after work at the Menlo Park Mall. Chi gave Shih a card at the Mall. Shih signed the card, dated it April 29 and returned it to Chi.

On May 10, Chi met with "Shirley", Tai L. Chiu in the parking lot at Respondents' facility. Chi asked Chiu if she wanted to join the Union. Chiu took the card home, filled it out, signed it, and returned it to Chi, in the parking lot the next day.

On May 15, Chi met with Hung Hui Lee at Respondent's parking lot. Chi gave Lee a card. Lee signed it in Chi's presence, and returned it to Chi.[25]

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28. I make this finding because April 28 was a Sunday, and all three witnesses confirm that it was a Sunday. Moreover, this finding is consistent with Chi's testimony that she obtained cards from other employees Yu and Huang on the same day that she received cards from Shen and Yao.

[25] Respondent contests this card for among other reasons the alleged confusion in Chi's testimony about this card. When shown this card, General Counsel incorrectly characterized the card as "Hetty's" card. However, "Hetty's" card was a different exhibit, and had already been introduced. When shown the card of Lee, Chi identified it as a card signed in the parking lot in Chi's presence. Although Chi failed to specifically testify to the name on the card, I am satisfied that the card was sufficiently authenticated by Chi.

On May 18, Chi met with Angela Tsoi, at Tsoi's home. Chi handed Tsoi a card, Tsoi signed it in Chi's presence and gave it to Chi at that time.

On May 19, Chi met with Kit Hang Sin at a beauty salon parking lot. Previously, Sin had telephoned Chi, and informed Chi that she wants to sign a card and to join the Union. However, Sin told Chi that Chi must be very careful and confidential with the card. Therefore, they agreed to meet away from Respondent's facility, at the beauty salon parking lot. Chi gave Sin a card at that time, and Sin signed it in Chi's presence and returned the card to Chi.[26]

A number of employees from whom Barbara Chi solicited cards, as described above, were given blank cards by Chi to distribute to other colleagues. In that connection, Michelle Shen spoke with employee Mane Chia while they were taking a walk during lunch. Shen asked Chia if she heard about the Union. Chia replied that she knew about the Union, and that she wanted to join. Shen answered that she had a blank card for her to sign, and would bring it in and give it to her. Two days later, once again while taking a walk during lunch, Shen gave Chia a card. Chia signed and filled out the card, dated it 5/1/02 and returned it to Shen.

Shen also spoke to Jen Er Hee, known as Serena Lee. Shen asked Lee if she wanted to join the Union and if so to sign a card. Lee said "OK", and Shen gave Lee a card. A few days later, Lee returned the signed card, dated 5/3/02 to Shen.

Helen Chou approached Shen during lunch in the parking lot at Respondent's Morristown facility. Chou told Shen that she wanted to join the Union and asked Shen how to get a card. Shen replied that she had a blank card and gave it to Chou. Chou took it home and the next day returned the card signed and dated 5/10/02 to Shen in the same parking lot.

On May 1, Chris Yu asked her fellow employee Hui-Long Jung (Julie) if she wanted to sign a card. Jung said "Okay". Yu gave Jung a card to sign during their lunch hour. Jung signed it in front of Yu and returned it to Yu. A few days later, May 3, Jung and Yu went out to lunch with Sandra Lau. Yu asked Lau if she had heard anything about a Union. Lau replied that she knows about it, but was not quite sure what is going on. Jung explained that the employees needed to sign a card and have a Union to protect their jobs. Lau signed a card in front of Yu and Jung and gave it back to Yu.[27]

On May 6, Yu spoke to both Cristina Truong and Violeta Chan about the Union. She asked them whether they want to sign cards and told them that the cards were to join the union

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[26] Respondent also objects to the authentication of this card, because Chi referred to it as "Katie's" card, and the Excelsior list makes no reference to "Katie" in listing Sin. The list does refer to Shin, Peggy Kit Hang, at the address listed on the card in Edison, New Jersey. However, whatever confusion that may exist from Chi's reference to Shin as "Katie," was cleared up by Respondent's cross examination, when Chi was asked where she had met Peggy Sin, and Chi confirmed that Sin's card was signed in her presence at a beauty salon, consistent with Chi's direct testimony. I therefore find Chi's testimony sufficient to authenticate Sin's card.

[27] Respondent objects to the authentication of this card, because the name written on the card is Sandra Li, and the signature cannot be read. Yu however was certain that it was Lau's card, and did not know why Lau wrote down her name as Li. In fact, Yu did not realize at the time that Lau had put down the wrong name. I also note that the Excelsior list contains the name Sandra Lau at the same address that appears on the card. I find the above evidence to constitute a prima facie identification of the card as Lau's card, requiring Respondent to adduce evidence to dispute Yu's credible testimony that Lau had signed the union card in front of her.

and to protect their jobs. Both Truong and Chan signed cards in front of Yu and gave them back to her.

Sherry Yao while hiking with employee Lan Ling Walter, told Walter that there was union organizing going on at Respondent. Yao informed Walter that the Union is very strong, it can protect people's jobs, and if the company is not fair to the employees, the Union will come and represent employees. Walter replied that she was interested in the Union. Yao gave Walter a card, asked her to sign, and said "If you want to join the Union, please sign the card." Yao also explained to Walter that the Union needed to get over half the employees to sign a card and then there would be a vote. Walter signed, filled out and dated the card May 4, and returned it to Yao.

Several weeks later, Yao approached Walter and suggested that Walter try to get a card signed by Eva Wong. Walter agreed and told Wong that everyone is discussing the Union, and it is her choice, and if she wants to join, Walter will get a card for her to sign. Wong did not respond immediately. A few weeks later Wong informed Walter that she is willing to sign a union card. Walter then obtained a blank card from Yao, and brought it to Wong at Wong's home. Walter told her that this is a card to join and to support the Union. Walter also informed Wong, what she had been told by Yao, that if the Union obtained signatures from over half of the employees, then there would be a vote. Wong filled it out and signed it and returned the card to Walter. The card was signed and dated May 30, 2002.

Hetty Shih, another of Chi's solicitees, agreed to give a card to Sharon Kuo, with whom Shih car pools. Shih gave Kuo a card to sign while they were driving to work on May 8. Shih told Kuo that signing the card authorizes the employee to join the Union. Kuo signed the card and returned it to Shih, who in turn, placed the card in Chi's car.

Shirley Chiu also took a blank card from Chi, when she signed her authorization card. Chiu gave the card to Shirley Fong an employee who works in her department. Chiu asked Fong if she wanted to join the union. Chiu also discussed with Fong the benefits of joining the Union, including a discussion of the benefits obtained by employees of the West Coast Division of Respondent, who had already joined the Union. Fong told Chiu that she wanted to join the Union, but wanted to take the card home. She did so, and the next day returned the signed card to Chiu. Chiu conceded that when Fong returned the card to her, "she didn't look very carefully," but was sure that the card introduced into evidence was the card given to her by Fong. Chiu did not testify whether she looked at the date on the card, nor did she testify as what the date was that she either gave the card to Fong or the date that she received it back from Fong. The card is dated June 14, 2002. I have examined the card, and all of it is filled out in the same ink, and the handwriting appears to me to be the same throughout the card, including the date. The back of the card, shows a date stamp, as received at the Region on July 23, 2002.

Respondent argues that Fong's card should not be counted, based on the principles of *First Legal Services, supra,* that sufficient confusion exists as to the date that Fong signed her card, so that General Counsel should have called Fong as a witness, to clear that up such confusion. Respondent also notes in this regard that Paolo Magbanua, who testified and authenticated a number of cards, admitted that he had filled in missing portions of some cards, including the dates. Finally, Respondent argues that Fong's card "conveniently" bears the June 14 date, the day before the eligibility cut off date of the Excelsior list.

Based upon the above circumstances, Respondent contends that "the fact that a date is written on a card provides no assurance that the card was actually signed on that day," and

argues further that an adverse inference should be drawn from the failure of General Counsel to call Fong as a witness.

I disagree with Respondent's contentions and arguments, and conclude that General Counsel has sufficiently authenticated Fong's card, through the credible testimony of Chiu. With respect to Respondent's request that an adverse inference be drawn from General Counsel's failure to call Fong to authenticate her card, Fong is an employee of Respondent, and there is no basis to conclude that she may be assumed to be favorably disposed to General Counsel or the Union. *Cf., International Automated Machines,* 285 NLRB 1122 (1987). Therefore it is inappropriate to draw an adverse inference against General Counsel or Charging Party, for their failure to call Fong, when Respondent could have just as easily called her as a witness. *Bufco v NLRB,* 147 F.3d 964, 971 (7th Cir. 1998); *J.C. Penny v. NLRB* 123 F.3d 988, 996 fn. 2 (7th Cir. 1997); *Plumbers & Steamfitters,* Local 40 *(Mechanical Contractors Assoc.),* 242 NLRB 1137, 1160 fn. 10 (1979).

Further, while I agree with Respondent that the date written on the card "provides no assurance," that it was signed on that date, the Board recognizes a presumption that the card was signed on the date appearing thereon. *Multimatic Products,* 288 NLRB 1279, 1350 fn. 126 (1988), *Zero Corp.,* 262 NLRB 445, 499 (1982); *Jasta Mfg. Co.,* 246 NLRB 48, 63 (1979).

While such a presumption can be overcome by evidence sufficient to put in question the date of Fong's card, I do not agree with Respondent that such evidence is present here. Respondent relies on the Board's date stamp of July 23, proving only that the Board did not receive the card until that date. However, since the Union filed its petition on June 4, and this card was not dated until June 14, it could not have been submitted to the Board by June 4. No evidence was presented as to how frequently the Union submitted cards to the Region subsequent to the filing of the petition, so there is no basis to conclude that the July 23 date of submission to the Board establishes that the card was signed at or about that date.

Respondent's reliance on the "convenient" date of June 14, as being one day before June 15 is misplaced. While the parties at the trial stipulated to June 15 as the crucial date for establishing majority status, that was in 2004, while the cards were signed in 2002, well before the date of June 15 became significant. While Respondent points to the fact that June 15 was the eligibility date for the election, that fact has no correlation with the date the card is signed. Fong was eligible to vote not because she signed a card before June 15, but because she was employed by Respondent in the unit on that date. Thus, there is no incentive as Respondent seems to be suggesting, for the Union to back date this card to June 14 of 2002.

Respondent's reliance on Magbanua's testimony that he filled out portions of some cards that he solicited including the dates, is also not significant. There is no evidence that Magbanua was ever in possession of Fong's card. The record established that Fong transmitted it to Chi who in turn gave it to Ting, before the card was given to the Union. Furthermore, the cards that Magbanua admitted filling in, were clearly in a different handwriting with different ink. Here, on the other hand, as I have noted above, the ink on Fong's card is the same throughout the card, and the handwriting appears to me to be the same. Thus I am satisfied that all the entries on the card, including the date were made by Fong. *Gordonsville Industries,* 252 NLRB 563, 565 (1980). (Board relies upon its scrutiny of the card to find that all entries were made by signer.)

Based on the foregoing I conclude that Respondent has adduced insufficient evidence of "confusion" as to Fong's card, to require under *First Legal Support, supra,* that General Counsel call Fong as a witness, and I find the card was signed and dated on June 14. I shall therefore count it towards establishing the Union's majority.

Respondent also argues that most of the cards authenticated by Chi,[28] including her own, and the cards signed by Walter and Wong are invalid, because these signers "believed the purpose of the cards was to seek an election." However, Respondent has applied the wrong standard. The issue is not what the employees believe, since the Board does not inquire into the subjective motives or understanding of the card signer to determine what the signer intended by signing the card. *DTR Industries, supra, Gissel, supra.* Where, as here the cards are unambiguous, single purpose authorization cards, the employees are bound by such language, unless there is a deliberate effort to induce them to ignore the cards express language by telling them that the sole and exclusive purpose is to get an election. *DTR Industries, supra* at 840; *Sheraton Waterbury, supra; General Steel, supra; Cumberland Shoe, supra.*

While Respondent argues that Chi was told that the card was for an election only, that assertion is not correct. Ting who gave the card to Chi, asked her if she wanted to join the Union when he gave her the card to sign. After being assured that the card would be kept confidential, and Respondent would not find out, Chi signed the card. At the same time that she signed a card, Ting also told her that there was going to be an election. While I note that the record does not establish whether Ting told Chi about an election before or after she signed the card, even assuming that I conclude that it was prior to her signing, Ting's comments are far from sufficient to establish that he was told that the card's sole purpose was to secure an election. Thus even though Chi was told about an election, she was not told either explicitly or in substance that the cards would be used for no purpose other then to help get an election as required to invalidate cards under *Gissel DTR Industries, supra;* at 842. The fact that Chi was told that the cards would be kept confidential does not establish its invalidity, *DTR Industries, supra.* Furthermore, while Chi was told about an election, she was also told that the card was to join the Union. Therefore Chi's card is valid. *DTR Industries, supra; Sheraton Waterbury, supra.*

Respondent argues further that since Chi was told about an election at the time she signed her card, it is reasonable to conclude that she also told this to everyone to whom she gave cards to. I do not agree with this contention, and in fact as I have related above, Chi made no mention of an election when she solicited cards from Huang, Lee, Sin or Tsoi. Respondent also included Kuo as one of the employees solicited by Chi, but in fact Kuo's card was solicited by Shih, and no mention was made of an election when Kuo's card was obtained by Shih.

I have found above however that when Chi solicited the card from Yao, Chi did say to Yao (as well as Chen),[29] that the employees of Evergreen would vote about whether there would be a Union. However, Chi also told them that they needed to sign the cards to join the Union. In such circumstances, based on *DTR Industries and Sheraton Waterbury,* and the others precedent cited, the comments made to Yao (and Chen) did not invalidate their cards.

Similarly, when Yao solicited Walter's card, and when Walter in turn solicited the card of Wong, the signer was told by the solicitor that the Union needed to get over half the employees to sign a card and then there would be an election. However, the card signers were also told that the card was to join and or support the Union. In these circumstances, based on the above precedent, the cards of Walter and Wong are also valid, and I shall count them towards establishing the Union's majority status. I shall also count all the cards authenticated by Chi, Shen, Yu, Yao, Walter, and Shih.

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[28] Respondent contests the cards signed by Huang, Kuo, Lee, Sin and Tsoi.

[29] Interestingly, Respondent does not contest Chen's card.

Respondent makes a general objection to practically all the cards authenticated, since they were not translated into Chinese. In this connection, Respondent notes that a number of employees testified through a Chinese interpreter, and many of Respondent's records are kept in Chinese.

I reject this assertion by Respondent. Respondent's business is conducted in English, employees are required to speak and read English, and Respondent presented no evidence that any of the witnesses or the card signers were unable to read English. To the contrary, although many of the witnesses were more comfortable testifying in English, this does not mean that they could not understand or read English. In fact my observation of the witnesses who testified indicated that most, if not all were able to understand and to read English. I therefore reject Respondent's contention that the failure to have the cards translated into Chinese in any way detracted from the validity of the cards to establish the card signors intent to authorize the union to represent them.

Colton Huang in addition to signing his own card, solicited cards from two employees, Shih Hsiao and S. L. Huang. Huang called Hsiao at home. He told her that employees are organizing for the Union and asked her intention. She replied "give me a card, I will sign". Huang gave her a card in the stairway of Respondent's facility. She read the card and took it home with her. The next day she returned it to Huang. Huang looked at the card and saw that it had been signed and filled out . The card is dated May 19. Respondent makes no specific objection to Hsiao's card and I find it to have been validly authenticated.

Colton Huang met with S. L. Huang at S. L. Huang's home. Colton told S. L. that the employees are organizing the Union. They talked about the reasons why they are organizing the Union. Colton testified that S. L. Huang's wife joined the conversation. Colton testified further that "his wife is already part of the Union through the Post Office union, so she was aware of the Union's point of view. So then he just signed the card." Colton observed S. L. fill out the card, sign it and return it to him.

Respondent contests S. L. Huang's card, contending that he "relied on incorrect information concerning" the card. Respondent did not specify what the "incorrect information" was, but appears to be arguing that S. L. Huang thought that he was signing a card for the Postal Union of which his wife is a member. However, in my view the above statements made by his wife do not reflect that S. L. Huang was confused about what union he was signing a card for, but merely that she, as a member of a union (the Postal Union) was in favor of S. L. Huang signing a card. The evidence reveals that he filled out and signed the card, which clearly states the name of the Union thereon. Therefore, I conclude that General Counsel has adduced sufficient *prima facie* evidence that S. L. Huang was aware of what he was signing, requiring Respondent to produce evidence to the contrary. I shall count S. L. Huang's card.

Mario Agosto signed a card for the Union after being told about it by Maria Magbanua. Kerry Brogan was also told about the Union by Maria Magbanua. She picked up a card at one of the union meetings, signed it and mailed it back to the Union. Both cards were dated prior to June 14 and were identified by the signers. Respondent does not contest either of these cards, and I shall count them as well.

Captain Meng was a Port Captain, which group as noted above, was eventually excluded from the clerical unit. However, Meng solicited a card for the Union from Rick Pao. Another Port Captain, David Tang, solicited a card from employee Mary Kyon. While both of these employees signed cards for the Union, their cards are dated July 1. Accordingly, they were signed after the June 15 date for measuring majority status, and cannot be counted

towards establishing the Union's majority status.

Similarly, the card signed by Andrew Chien is dated June 24. Therefore, for the same reason, this card cannot be counted.

Robert Levy, the President of the Union also furnished testimony attempting to authenticate the cards of several employees. According to Levy, at the Union's meeting of employees at a hotel on April 15, authorization cards were distributed to the employees present, after Levy told them about the Union and that by signing a card, they would be authorizing the Union to represent them in collective bargaining with Respondent. Levy testified further that at the end of the meeting, he received from 6 to 10 cards. Levy identified cards allegedly signed by Michael Biscocho, Katelin Li, Michael Gunshefski and David Chiang, all of which were dated April 15. While Levy did not see any of them sign their cards, he testified on direct examination that they all gave him their signed cards back at the end of the meeting. On cross-examination, Levy's recollection was not as certain, and when asked which employees returned cards to him on that day, he was able to name Chiang, Gunshefski, and "a couple of others." Gunshefski and Chiang identified their cards, and confirmed that they were signed at that time. Respondent does not contest these cards and I shall count them towards the Union's majority.

Respondent however does contest the cards of Biscocho and Li, asserting that Levy provided no direct testimony about receiving either of these cards. I disagree. Levy did identify both of the cards, as having been returned to him signed at the end of the meeting, along with the cards of Chiang and Gunshefski. While Levy could not recall the names of Li or Biscocho, on cross examination, he did testify there were "a couple of others," in addition to Gunshefski and Chiang. I therefore find that Levy's testimony constitutes sufficient *prima facie* authentication for the cards of Li and Biscocho. Since Respondent adduced no evidence to refute the authenticity of either of these cards, I shall count them.

Levy also testified that he received a signed card from an employee named George Patronov, which is dated April 14. Levy was extremely vague and uncertain concerning the circumstances of receiving this card from Patronov. Levy could not recall where he was when he received the card from Patronov, but did assert that he told Patronov that the card authorizes the I. L. A. to represent the Evergreen employees and if he would like to join, to sign the card. Levy admitted that he did not see Patronov either sign the card or fill it out, but was certain that he had received it from Patronov, because Patronov, unlike most of the employees was not Chinese. Levy added that he thought that Patronov was Polish.

While I find Levy's testimony somewhat uncertain and vague, I find it to be credible, particularly his testimony that since Patronov was not Chinese, Levy recalled receiving a card from him. I therefore find Patronov's card to have been sufficiently authenticated, requiring Respondent to come forward with evidence to refute the fact that Patronov signed the card, and authorizing the Union to represent him. I shall count Patronov's card.

Finally, Levy testified that he received a signed card from James Chien, at someone's home on July 11. Levy provided no other testimony concerning the circumstances of his allegedly collecting this card. Since Chien's card was dated July 11, after the crucial June 15 date, this card cannot be counted towards establishing the Union's majority status.

Based on the foregoing, I have found that General Counsel has adduced sufficient evidence that 62 employees at Respondent signed cards authorizing the Union to represent them, prior to June 15, 2002, and that therefore since there were 115 employees in the unit, the Union represented a majority of Respondent's employees in the bargaining unit at that time.

V. The Organizing Campaign

As detailed above, the Union conducted its organizing campaign starting in mid-April. Most of the card solicitation took place outside of the facility, and although there was some evidence of solicitations at the facility, the evidence is clear that the employees were very careful to try to make sure that no supervisors were present at or aware of any of their attempts to discuss the Union or to solicit cards. I note in this connection that when Chi received completed cards from employees, she arranged for the employees to place the cards in Chi's car, by providing the employees with a combination number to enable them to enter her car. The record contains no direct evidence that any of Respondent's representatives observed any solicitation of cards or union discussions amongst its employees.

In late April or early May, Thomas Chen, Respondent's president was shown a copy of a blank union card by Owen Wu. The card had been turned in by Eddie Lou, V. P. of Sales. Lou testified[30] that he had received a blank card from Ralph Cammano, one of his sales managers. Cammano told Lou that it was a union card, but according to Lou he did not tell Lou where or who had given him the card. Lou immediately turned the card over to someone in Human Resources (HR), who Lou could not recall.

Chen testified that after being shown the card by Wu, he called legal counsel. After that call, Chen concluded that since he had seen only one card, he did not know the significance of it, so he decided to "observe" for a period of time and not take any action. According to Chen, it wasn't until the third week of May that he "truly believed" that there was organizing going on, when several managers reported to him that there were discussions about the Union activity going on in the office. Further, Chen had heard "rumors" going on in the office, concerning the possibility of Respondent moving or relocating. Therefore, Respondent decided to hold a meeting on May 23 to address these issues.

Robert Levy furnished testimony that he as well as four other union organizers began distributing union leaflets at Respondent's Morristown facility as early as late March or early April. He did not specify how many days that he and or his representatives distributed any union literature. A number of Respondent's witnesses deny ever seeing any union literature or leaflets distributed until after the Union filed its petition on June 4.

I do not credit Levy's uncorroborated and unpersuasive testimony in this regard. Significantly, Levy submitted detailed reports to Robert Gleason, International Secretary-Treasurer, reflecting the Union's activities during the months of April through July. For the months of April and May, there is no reference to distributing any literature or leaflets at the Morristown facility, while these reports did detail organizational meetings at Hotels or at the I. L. A. offices. The first reference to the distribution of Union literature was in the June report, and it specifies "distributed and mailed organizational material to Evergreen clerical employees," on June 7, and on June 10 the report states "hand distributed fliers at Morristown, NJ headquarters to Evergreen clerical employees." Similar notations were made for various dates in June and July. It is also notable that although Levy testified that four other union officials accompanied him while he was distributing union literature in late March or April, none of the union officials were called to corroborate Levy's testimony in this regard. I find it appropriate to draw an adverse inference against General Counsel and Charging Party for its failure to call such witnesses, and conclude that if called, they would not corroborate that Levy distributed union literature at Morristown in March or April. *International Automated Machine,*

[30] Lou did not recall the date of this incident.

supra.

Furthermore, General Counsel called numerous employees including several members of the organizing committee as witnesses to testify about a number of issues including card solicitations, union organizing and literature distribution. None of these employees furnished any testimony that corroborated Levy that there was any distribution of union literature outside the Morristown facility, by union representatives in March or April.

For the above reasons I discredit Levy's testimony in this regard, and conclude consistent with the testimony of Respondent's witnesses, that such activities did not commence until after the petition was filed on June 4.

As I mentioned above, when Chiang and Ting first met with representatives of the Union in late March, they told Daggett that one of the reasons why the employees wanted to be represented by a union was concerns over job security. These concerns were based on the fact that Respondent had recently transferred a small amount of job functions from Morristown to its Charleston, South Carolina facility. Further, Chiang had been present at several management meetings, where Owen Wu discussed the possibility of updating Respondent's computer system. Wu added that this will enable Respondent to hire "high school graduates" and not have to pay such a high salary. Chaing also attended a department meeting, conducted by Captain Lin, wherein Lin stated that in discussing Respondent's business, that the company is trying to "change blood." Chiang interpreted this to mean that Respondent intended to "get rid of old employees." Chiang reported these conversations, as well as his interpretation of the remarks of Respondent's officials to some of his fellow employees.

The Union's campaign literature, consistent with this fear of employees, was filled with allegations and assertions, to the effect that union representation would protect employees from job loss or from Respondent moving, closing or relocating its facilities.

For example, in one flyer distributed to employees, the Union made reference to union organizing in Respondent's L. A. office.[31] The leaflet alleges that during the L. A. organizing campaign, management had "strongly said they'd shut down the office in L. A. if the union steps in, but you can see L. A. stays the same with full benefit from the union. In return SAF, TCM[32] were shut down because no union can protect them."

In a June 17 flyer, announcing the agreement to hold an election, the Union gave some examples of comments that management might make, which employees should not believe. Such remarks included, "Evergreen will pull out of Morristown if you go Union."

The leaflet then goes on to say that "Evergreen did not go bankrupt when the West Coast office people took on a strong union to represent them. Meanwhile, look at how much better off they are today, with a contract that protects them…."

On June 20, the Union distributed another flyer, as a letter from the organizing committee. The letter states that when Respondent's L. A. office was being organized, Respondent's San Francisco and Portland offices were also "interested" in being unionized. The letter adds that "EGA SFC, and EGA PTL is now CLOSED; because they believed in

[31] A different local of the I. L. A. obtained recognition from and contract with Respondent, in 1996 and 1997.

[32] Referring to Respondent's locations in San Francisco and Tacoma.

management's words. They believe that the company would treat them nicely and fairly since they are loyal and did not vote themselves in a union. Most of them were laid off, and some were transferred to EGA SLC[33] with pay deduction."

In another portion of this document, the question was asked if employees think management will have mercy should unionization fail? It then refers to the fact that several competitors of Respondent had moved or are in the process of moving their headquarters from New York or New Jersey to southern cities such as Norfolk and Baltimore. It then concludes, after discussing that such moves are based on "budget control," that "THIS IS EXACTLY THE WAY EVERGREEN CLOSED DOWN THEIR PREVIOUS 16 OFFICES!!"

Another flyer refers to clauses in the Union contract in L. A. which purports to protect employees job security, such as "bargaining unit work cannot be moved more than 40 miles from the Port of Los Angeles, Berth 23."

A subsequent flyer again emphasized that the company had promised employees in Tacoma and San Francisco that they would not move to Salt Lake City and were told they did not need a Union and their jobs were safe. It continues to say that employees at Tacoma and San Francisco did not vote for the Union, and "despite the company's promises these people were moved to Salt Lake City, Utah. In Los Angeles they voted for the Union. These employees remained at their jobs in Los Angeles. No one from Los Angeles was moved to Salt Lake."

In yet another flyer, which included portions of a sample ballot with a check in the "Yes" box, a picture of Evergreen's San Francisco and Tacoma offices was depicted with the words "Closed" across the building. The flyer once again accused Respondent of closing the Tacoma and San Francisco offices and forcing people to move, where such employees had voted against a Union to protect them.[34]

Moreover, during the campaign, the Union brought in union members from Respondent's L. A. office to meet with and address employees of Respondent. During one of these meetings Levy spoke and reaffirmed the Union's message. He told employees that if the Union loses, "the company would probably close, or relocate out of state to avoid another organizing campaign." He pointed to posters taped to the walls of the meeting place, which reflected names of companies that voted against the Union and had moved out of state. Levy added a question, "what happened to the EGA offices in Oakland, Portland, Seattle and elsewhere?"

Respondent, in order to respond to these and other assertions made by the Union in its leaflets, set up a team of supervisors, who worked with Human Resources to prepare Respondent's campaign communications. Several of these documents attempted to respond to the Union's assertions about Respondent closing or moving, and or whether the Union could protect employees from such actions.

One flyer entitled Union Refuses to Sign Guarantees, states that the Union cannot guarantee the future, and refers to the union's statement that if the Union loses, Respondent will move. The flyer asserts, "we have stated repeatedly that EGA headquarters will remain in

[33] Referring to Respondent's office in Salt Lake City, Utah.

[34] I would note that there is no record evidence that there was a vote for a union in Respondent's Tacoma or San Francisco offices, or indeed that there was even any attempts made to organize such employees.

Morristown or Jersey City with or without the Union." It then goes on to quote Vice Chairman S. S. Lin's comments on June 27, 2002, that he understood employees are concerned about relocation, but "I would like to confirm here that Evergreen will not and has never intended to move the US headquarters of Evergreen America to any other location outside this area."

Another flyer responding to a letter from an ex-employee presumably written in support of the Union, states that the Union cannot guarantee job security. It goes on to point out that union promises did not help the steel or textile industries, or automotive industries from closing facilities and losing jobs to foreign competition. Also unions could not stop Ford from closing its plants in New Jersey or manufacturing and textile mills from closing down and moving overseas.

Another flyer consisted of a letter dated 7/12/02 allegedly from a "concerned forgiving employee." This letter was allegedly from an employee who had signed a card, but after reading the propaganda from both sides and attending lunches and dinners with both sides, has decided to vote "No." The letter talks about the job security issue, and states that the writer is willing to give management a chance to fulfill its promise not to move. It then discusses the closing of Respondent's other offices such as San Francisco and Portland, and asserts that these actions were taken for legitimate business reasons, and argues that Respondent could not afford to disrupt its business by training 230 new employees due to relocation.

Additionally, shortly before the election, COSCO (China Ocean Shipping Co.) one of Respondent's competitors, announced a decision to move some of its work overseas. The Union began to use this announcement as a further campaign issue, by telling employees that if they did not vote for the Union, Respondent would move just like COSCO. Accordingly, Respondent issued a flyer, with a written "Guarantee" attached, signed by Thomas Chen. The flyer states that whatever reason COSCO is considering moving from NY/NJ, has nothing to do with Respondent. It adds that Respondent has not threatened to move or retaliate against employees, but instead issued a firm commitment to stay in New Jersey. It referred to Vice Chairman Lin's announcement on June 27, and the Guarantee signed by President Chen. The Guarantee itself states the Respondent guarantee's to its headquarter employees, "no relocation from New Jersey, no loss of headquarters' positions, and no retaliation against EGA employees." It was signed by Chen and dated July 16, 2002.

VI. The Alleged Unlawful Threats and Interrogations

The Fourth Amended Complaint makes numerous allegations of unlawful threats of plant closure or relocation or loss of benefits or other reprisals if they supported the Union, and of unlawful interrogations, allegedly committed by numerous specifically named supervisors on various dates.

After the briefs were filed and received, I conducted a conference call with the parties during which the issue of reply briefs was discussed and agreed upon. During that discussion Respondent noted that in General Counsel's brief to me, it did not provide any specific connection between facts alleged in the brief and the allegations in the complaint, or any legal analysis. Respondent claimed that it was severely prejudiced in attempting to respond in a reply brief to these complaint allegations. I instructed Respondent to simply assume that all of the facts detailed in General Counsel's brief were alleged to be unlawful and General Counsel concurred.

Respondent did file a reply brief, in which it did attempt to assume that all of the facts detailed in General Counsel's brief were alleged to be unlawful, and argued why Respondent believed such statements were lawful. Nonetheless, Respondent asserts that it was severely

prejudiced by this procedure, since in effect General Counsel is arguing that all statements made about the Union by supervisors is unlawful, which is of course incorrect, and contrary to 8(c) of the Act.

Further Respondent argues that General Counsel has violated its own case handling manual, by failing to set forth the specific alleged violations or supporting case law, and for the above reasons, argues that these complaint allegations should be dismissed.

While I agree with Respondent that it would have been preferable for General Counsel to have specified which statements made by Respondent's Supervisors constituted unlawful conduct, and to have included legal analysis supporting such assertions, I cannot agree with Respondent's assertion that it has been unduly prejudiced, or that General Counsel's conduct require dismissal of these complaint allegations. Respondent did in fact have the opportunity to respond to General Counsel's brief in a reply brief, where it was able to detail its position on all the potential violations. Therefore I find no prejudice to Respondent by General Counsel's conduct, and deny its request to dismiss these complaint allegations.

I do note however that it is not totally clear to me, which statements made by Respondent's supervisors are alleged by General Counsel to constitute unlawful threats or unlawful interrogations. In many allegations, the position of General Counsel is clear, but in others such statements such as the "Union is no good", "the Union is connected to the mafia", or "related to gangsters," or "the Union had no experience in shipping and dealt with blue collar workers employed by Kentucky Fried Chicken" were cited. I am not sure whether General Counsel contends that these statements are unlawful. Nevertheless, I shall attempt to as best as I can, discern General Counsel's view, and decide based on the record testimony, what statements, if any of Respondent's supervisors are violative of the Act.

A. Alleged Threats

The Accounting Finance and Funds employees of Respondent all report to Executive Vice President Raymond Lin. The Finance department is directly supervised by Deputy Jr. Vice President Kevin Huang.

Chris Yu and Michelle Shen, employees in the finance section were both spoken to by Huang and Lin about the Union. On the day before the election, Huang called Yu at home. After asking Yu about how she and other employees were going to vote, Huang informed Yu that if the employees chose the Union, the company would be closed, and asked Yu to support the company.

Yu also had another conversation with Huang at her desk in the office. After asking Yu if she had heard any co-workers discussing the Union, Huang said that the "Union is no good." During a third conversation with Huang, during which he informed Yu of her promotion, Huang once again told Yu that the Union is "no good."

Finally, Yu had been told by Huang several years ago that the company had moved from Jersey City to Morristown, New Jersey to get away from the Union.[35] During one of her conversations with Huang about the Union in 2002, described above, Yu asked Huang whether

[35] Respondent had in fact moved from Jersey City to Morristown five years ago. Yu conceded that as far as she knew there was no union organizing going on at Jersey City when Respondent moved.

he had told her previously that Respondent had moved to Morristown to get away from the Union. Huang smiled and did not respond to Yu's question.

Shen was called into a meeting room at Respondent's facility by Huang sometime in May. Huang told Shen that the Union is no good for the company and they don't know how to operate this kind of business. Huang added that if the Union becomes involved with the company, the company could be "destroyed," or could "shut the door, the company could be completed, finished."

A few days prior to the election, Yu was called into Lin's office. Lin told Yu to support the company, and added that if employees join the Union the company might be closed. He also mentioned during this conversation that if a union comes in, the company might be less competitive. The night before the election, Lin called Shen into his office. He asked her to support the company. Lin added that Evergreen has a very good relationship with the I. L. A., but that the I. L. A. doesn't really want Respondent's employees to join the I. L. A., but since the I. L. A. could not reject Respondent's employees, they assigned Local 1964 a "low cost lousy" local to service Respondent's employees. Lin asked Shen to call a couple of her friends and tell the friends what Lin had told her. Shen responded that she cannot guarantee but she will try her best. In fact Shen did not tell anyone about what Lin had said to her.

A couple of days before the election, a meeting of the Finance Department was held. Present were Shen, Yu, two other employees Christina Truong and Grace _____ as well as Huang. Lin conducted the meeting. Lin asked the employees to support the company Lin also mentioned bad economic conditions and added that if employees wanted to go out and compete with younger employees they wouldn't make it and would not survive. Lin also told the employees that if they joined the Union, the company might close. Additionally, Lin instructed the employees not to attend any union meetings, not to read the union's flyers, and if they received any flyers throw them in the garbage without reading them.

After this meeting, Shen discussed Lin's comments with fellow employees Helen Chou, Peggy Sin, and Chris Yu. Shen said to the employees that they better not look at the union's flyers, in case someone sees and reports it to the manager. Therefore, Shen suggested bringing the flyers home and looking at them there. Shen also said that even though Lin had instructed them not to attend union meetings, she felt that they should at least go to one more meeting. Thus she asked Chou and Sin to go with her to a Union meeting.[36]

Based upon the above factual findings, I conclude that Respondent committed several clear violations of plant closure. The statements made to Shen and Yu by Huang and Lin in individual conversations, and Lin at a meeting of the Finance Department that if the employees joined or chose the Union, Respondent might or would close or be "destroyed" or "finished," constitute threats to close if employees select the Union as their representative, and are violative of Section 8(a)(1) of the Act.

Respondent argues that the statements made by Huang and Lin are "too vague and insubstantial to support a finding of an unlawful threat." *Miller Industries Towing Equipment,* 342 NLRB No. 112 slip op p. 2-3 2004.) I disagree.

[36] My findings with respect to the statements made to employees by Huang and Lin are based on a compilation of the mutually corroborative and credible and undenied testimony of Shen and Yu. I note that neither Huang nor Lin testified on behalf of Respondent to deny any of the comments attributed to them by Shen and Yu.

It is well settled that a prediction of plant closure as a possibility rather than a certainty, is violative of the Act. *Daikichi Sushi,* 335 NLRB 622, 624 (2001); *McDonald Land & Mining Co.,* 301 NLRB 463, 466 (1991). Indeed in *Gissel,* 395 U.S. 575, 616-620 (1969) itself, where the standards for evaluating the lawfulness of predictions of adverse consequences based on the Union's appearance were formulated, the employer stated that a strike, "could lead to the closing of the plant." *Id*. at 588. Here the statements made by Huang and Lin clearly equated the employees selection of the Union with closure of the plant, and cannot be construed as vague and insubstantial, as were the comments made in *Miller Industries, supra.* (Supervisor mentioned the possibility of plant closures if there is a Union due to costing the company money.)[37] The fact that in some of the conversations described above, the supervisors mentioned competiveness or economic conditions, is not sufficient under *Gissel* to render the comments lawful. Respondent's supervisors cited no objective facts that would show if employees unionized either economic conditions or competitive pressures would force Respondent to close for reasons beyond its control. *Daikichi Sushi, supra; A P Automotive Systems,* 333 NLRB 581 (2001).

Accordingly, I conclude that Respondent has threatened plant closure by the statements of Lin and Huang in violation of Section 8(a)(1) of the Act.

I have also found above that Huang told Yu twice and Shen once, that the Union is "no good." As I have related above, it is not clear, whether General Counsel is asserting that these comments are unlawful. However, assuming that General Counsel does take such a position, I disagree, and find such statements protected by Section 8(c) of the Act, and are not unlawful. *Newsday Inc.,* 274 NLRB 86, 95 (1985).

Similarly, I conclude that comments made by Lin to Shen that the I. L. A. does not really want to represent Respondent's employees, and that it therefore assigned a "low cost lousy" local to represent such employees, is also protected by 8(c) and is not unlawful.

Further, General Counsel introduced evidence of a statement made by Huang to Yu, several years ago, that Respondent had moved from Jersey City to Morristown to get away from the Union. Since this statement was made years ago, section 10(b) bars a finding that the comment violated the Act. While Yu herself brought up this comment of Huang in 2002, when they were discussing the Union, Huang merely smiled, which cannot be construed as a reaffirmation of his remark made years before. Therefore I find no violation based on that statement made by Huang.[38]

Finally, I have also found above that Lin at a meeting of employees of the Finance Department, instructed them not to attend any union meetings, not to read the union's flyers, and if they received any flyers, throw them in the garbage without reading them.

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[37] I would note that the finding in *Miller* that this statement was not an unlawful threat of plant closure was based on an Administrative Law Judge decision, where no exceptions were filed to the Administrative Law Judge's finding no violation as to this statement.

[38] Respondent presented credible evidence that Respondent's decision to move from Jersey City to Morristown was based on economic factors alone. My finding that Huang made the statement to Yu as described above, is not a finding that Respondent did in fact move to avoid the Union. At most it established that Huang, for some unknown reason believed that to be the case.

There can be little doubt that by directing and instructing its employees not to attend union meetings, not to read union literature, and to throw in the garbage any union literature that they receive, Respondent interfered with employees' protected rights to receive union literature and to attend union meetings, in violation of Section 8(a)(1) of the Act. *Romar Refuse Removal,* 314 NLRB 658, 665 (1994); *Hanson Aggrates Central,* 337 NLRB 870, 875-76 (2002); *Southland Knitwear,* 260 NLRB 642, 655 (1982); *Service Solutions,* 332 NLRB 1096, 1101 (2002).

However, there is a question as to whether it is appropriate for me to find such a violation, since there is no complaint allegation concerning such conduct, and General Counsel did not amend the complaint to allege this violation.

However, the Board may find and remedy a violation, even in the absence of a specific complaint allegation, if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Casino Ready Mix Co.,* 335 NLRB 463, 464 (2001), *enfd*. 321 F. 3d 1190, 171 LRRM 3289, 3296-3297 (D.C. Cir. 2003); *Pergament United Sales,* 296 NLRB 333, 334 (1989), *enfd.* 920 F. 2d 130 (2d Cir. 1990). See also, *Miller Industries, supra.,* ALJD slip op at p.13. fn. 6.

There is no question that this allegation is closely related to other complaint allegations, as it is it represents further demonstration of Respondent's interference with its employees Section 7 rights to support unions. However the issue of whether the allegation was fully litigated is a much closer question, particularly since there is no other complaint allegation alleging this conduct to be violative of the Act, much less an allegation that Lin violated the Act by the statements involved.

On the other hand the complaint does allege that Lin violated the Act in several respects, including during the same meeting of employees, where he made these comments. In these circumstances Respondent was on notice that General Counsel would hold Respondent accountable for Lin's conduct. *Casino Ready Mix, supra;*[39] *Five Cap, Inc.,* 331 NLRB 1165, 1183 (2002); *Williams Pipeline Co.,* 315 NLRB 630 (1994).

Moreover, Respondent made no objection to the testimony when offered about these statements, and cross examined General Counsel's witnesses about the meeting in general, as well as concerning Lin's comments about Union literature. In such circumstances, I find that the issue was fully litigated and that is appropriate for me to find a violation based on such conduct. *Casino Ready Mix, supra.; Five Cap, supra; Williams, supra.* See also, *Casino Ready Mix v. NLRB,* 171 LRRM at 3296-3297.

William Sung is employed by Respondent in the Accounting department, consisting of twelve employees, plus two supervisors, who all report to Raymond Lin. At some point between the signing of Sung's card and the election, Sung was present at a meeting of the entire Accounting department, conducted by Lin, in the office of supervisor Stephen Tan. Lin told employees not to join the Union, do not believe what the union says, and do not look at documents from the Union. Lin also said that if the Union comes in to the company, then the cost of operation will increase and if the company cannot afford the added cost, then the company might close. Lin then became very excited and stated, "if the company is closed, then all of us will be out of a job. Then we will all go to hell."

[39] I note that in *Casino Ready Mix,* there was no complaint allegation that the supervisor involved committed any violations, but only an agency and supervisory allegation.

Sung also discussed the Union with deputy human resources manager Mike Liu during lunch. Lin told Sung that the Union is related with an "underground society, the gangsters." Liu also said that the purpose of the Union is to try to control the employees 401(K) money. Finally Liu said that if there is a Union in the company, then the company will have to add the operating cost, and if the company cannot afford this cost, the company will close. If the company closes, then all of the employees will lose their jobs. Therefore, Liu concluded that it would be "best that we don't have a Union."[40] I conclude that the statements made by Lin at the meeting, and Liu during his individual conversation with Sung, constitute unlawful threats to close in violation of Section 8(a)(1) of the Act. Although their comments were coupled with statements to the effect of that Respondent might close because it would not be able to afford to operate with a Union, Respondent's officials cited no objective facts that would show Respondent would be unable to afford to operate if the Union came in. Thus Respondent presented no evidence that the Union made any demands, or that demands if met would have the "demonstrability probable consequence" of forcing Respondent to close for reasons beyond its control. *Daikichi Sushi, supra.; A P Automotive Systems,* 333 NLRB 581 (2000).

The facts that both Lin and Liu included themselves as among those that will lose their jobs as a result of employees choosing the Union, does not render their words any less of a threat. *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1123 (2002); *Clinton Electronics,* 332 NLRB 479 (2000).

Additionally, as detailed above, Lin during his speech to the Accounting Department, instructed the employees not to look at documents from the Union. These remarks are similar to his statements to the Finance Department not to read Union literature and to throw it in the garbage, that I have found above to be unlawful. I find similarly with respect to this statement by Lin for the same reasons and based on the same authority.

With respect to the procedural issue, as was the case with the remarks made to the Finance Department, when testimony was offered concerning Lin's admonition not to read Union documents, Respondent did not object, and Respondent did cross examine about the meeting conducted by Lin. In such circumstances, where as noted the complaint did allege that Lin's conduct violated the Act in other respects, Respondent was on notice that it would be held responsible for Lin's statements to employees, I find that the violation found is closely related to the complaint and that the issue has been fully litigated. *Casino Ready Mix, supra; Five Cap, supra; Williams, supra; Miller Industries, supra.*

Sung's testimony also revealed that Liu told him that the Union was related to "gangsters", and the purpose of the Union is to try to control the employees 401(K). While I am unsure if General Counsel asserting that these remarks are violative of the Act, I find that they are protected by 8(c) of the Act and shall not find violations based on these comments. *Sears Roebuck & Co.,* 305 NLRB 193, 194 (1991); *Salvation Army Residence,* 293 NLRB 944 (1987); *Camvac International,* 288 NLRB 816, 820 (1988); *Newsday, supra; Nestle Co.,* 298 NLRB 732, 737 (1980).

Shirley Chiu is employed by Respondent in the Funds Department, which collects accounts receivables. This department also reports to Raymond Lin. Prior the election, Lin also conducted a meeting of the Funds Department. At this meeting Lin instructed the employees not to attend meetings and not to read the flyers distributed by the Union. He added that

[40] The above findings are based on the credible, undenied testimony of Sung. Neither Lin nor Liu testified.

employees should throw the flyers out. As was the case of similar statements made by Lin at the meetings of the Finance Department and Accounting Department, Respondent did not object to this testimony and cross examined Chiu about Lin's remarks. Accordingly, based on the analysis and authority cited above, I find that Respondent violated Section 8(a)(1) of the Act by Lin's statements.

David Chiang and Kamud Patel were both assigned by Respondent to work at Maher Terminal in Elizabeth, New Jersey during the organizing drive. Their direct supervisor was Jeff Tung. Both Chiang and Patel had conversations concerning the union with Tung as well as with other members of management after the filing of the petition.

Tung spoke to Chiang and Patel individually in a reception room at the Maher Terminal. During both conversations, Tung talked about the rumors and flyers that were going around about the company moving. Tung said whether or not the company moves depends on the financial status of the company. He added that big companies like Boeing and G. M. all have unions, but if the company's financial situation is not good, they will still move.

During the conversation with Patel, Tung also talked about the comparison between benefits of union versus non-union companies. He mentioned that Respondent has very good health insurance, which is particularly important for ladies who are pregnant.[41] However, on the Union side, most unions offer HMO plans which is not so good as Respondent's health insurance plan.

Tung also stated that on the union plan, usually promotions are dependent on seniority. However, Respondent's policy for promotion is based on performance, and attitude, and if you are doing excellent, you would be promoted faster.[42] Tung also testified which I credit, that he made statements similar to those he made to Chiang and Patel to the two or three other employees under his supervision at Maher Terminal during the campaign.

Charles Yeh, Respondent's Junior Vice-President visited Maher Terminal, and spoke to each employee one-on-one in the back office. Yeh mentioned that it is not true what had been discussed in the campaign, that once you are part of the Union, your job is secure, the company will stay and you will not lose your job. He gave some examples of companies that had moved or relocated, even though they were unionized.

Barbara Chi had two similar conversations with Yeh in a meeting room in Morristown prior to the election. In the first meeting, Yeh told Chi that the union would not necessarily protect the employees, and that moving or closing could still happen even with a union.

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[41] Patel was pregnant at the time.

[42] My findings with respect to these conversations, is based primarily on the testimony of Tung, whom I found to be a credible and candid witness. I do not credit Chiang's testimony that Tung said "if we join the Union, it can cause the company a heavy burden and it can close out the company." This testimony was elicited as a result of leading questions, and only after Chiang was shown his affidavit. I do not find this testimony credible, particularly since Tung's comments as credited, was similar to statements made by other supervisors and in Respondent's flyers. Patel testified that Tung said that if the union came in there would be less opportunity for promotion, without further explanation. I find Tung's version of the conversation to be more plausible, and find that Patel may have believed from Tung's explanation, that there would be less opportunity for promotion if the union came in.

During the second meeting, about a week later, Yeh informed Chi again that the union cannot protect the employees, because moving or closing can still take place. Yeh pointed specifically to G. E. and to Ford in Edison, New Jersey, which is near the home of both Chi and Yeh, which was closed and moved.[43]

I find, contrary to the assertions of General Counsel, that there was nothing unlawful about any of the above comments made by Tung and Yeh to the employees of Respondent during these conversations. Although both Yeh and Tung implicitly raised the possibility of Respondent moving or closing during these conversations, the statements must be evaluated in context. It is clear to me that Yeh and Tung were not threatening that Respondent would or might close if the union came in, but was merely responding to claims made in the Union's campaign leaflets, that bringing in the Union would guarantee the employees job security and would assure the employees that Respondent would not close or move. They were simply pointing out to employees, the reality of the situation with respect to moving or closing. That is, that companies move or close based on financial considerations, and that having a union cannot assure employees that companies, such as Respondent or G. E. or Ford, or any company, will not close, move, or reduce jobs. It is significant in this regard that the Union's campaign materials were filled with assertions that Respondent had moved or closed several facilities in the West which did not have a union, while keeping open its L. A. office, which was represented by a union. Thus, the statements by Yeh and Tung were merely responding to the union's assertions, that selecting the union would automatically protect them from Respondent moving or closing its New Jersey facility. I find that they were therefore protected by 8(c) of the Act and were not unlawful.

I also find that Tung's statement to Patel, about promotions not to be violative of the Act. He merely explained, as described above, his view that with a Union contract, promotions are based on seniority, but with Respondent promotions were based on performance and attitude, and if the employee is doing excellent work, she would be promoted faster. Thus Tung was not threatening Patel that Respondent would reduce promotion opportunities if the Union got in, but only that in his opinion, Respondent's current system of promotions, offers better opportunities for promotion, than does Union contracts which base promotions on seniority. I therefore find that this statement is also protected by 8(c) and not violative of the Act. *General Fabrications Co.,* 328 NLRB 1114, 1131 (1999); *Pentre Electric, Inc.,* 305 NLRB 882, 883 (1991). [44]

A few weeks before the election, Wayne Ting, was spoken to by his immediate supervisor, Jason Chuang in the lunchroom. Chuang asked Ting how does he feel about what's taking place at work? Chuang added that Ting should think about it, look at the logistic department, and that Ting had good potential. Chuang told Ting there is no major problem for the next promotion to become deputy manager in that department, since his record is pretty good. Chuang repeated that Ting should "think about that." Ting made no response and just smiled.

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[43] The above findings are based on the undenied testimony of Chi and Patel. Yeh did not testify.

[44] It may of course not necessarily be accurate that most union contracts base promotions solely on seniority, but that does not make Tung's statement unlawful. He was simply stating his opinion, that Respondent's promotion system affords better opportunities for promotion that does most union contracts, and this comment cannot reasonably be construed as a threat by Respondent to reduce promotions, in the event the union is selected.

After this testimony was introduced, General Counsel moved to amend the complaint to allege this conversation as an unlawful interrogation, and an unlawful threat of loss of benefits. I shall consider whether the conversation constitutes an unlawful interrogation below, when I discuss the interrogation allegations.

However, I cannot find anything in the conversation to constitute an unlawful threat. If anything, the comments concerning promotion and the direction to Ting to "think about it", could represent an unlawful promise of benefit, which I will also discuss below when considering those complaint allegations. However, since I do not find any evidence of a threat in Chang's statements, I shall recommend dismissal of that complaint allegation.

Barbara Chi, who as noted was one of the primary organizers for the Union, was spoken to by her immediate supervisor, David Chou, about two weeks after the election. Chou asked Chi "why did you lead this campaign?" Without waiting for a response, Chou said, "now I can't help you anymore." Chan explained that Kevin Kuo, Vice President of Evergreen Marine in Taiwan, had called Chou and mentioned Chi's name, and that Kuo was aware that the logistics department is "leading the situation." Finally, Chou told Chi that Taipei could assign staff from Taipei headquarters to do work of Respondent's employees. [45]

I conclude that the above statement of Chou that "he couldn't help Chi anymore," because of her role in leading the union campaign to be an unlawful implied threat of reprisal in violation of Section 8(a)(1) of the Act. Similarly, I conclude that Chou's statement that Respondent could assign employees from Taipei to perform work performed by bargaining unit workers in the context of this conversation, also represents an unlawful threat to retaliate against employees by assigning their work to employees from Taipei, because of their support for the Union.

Colton Huang is an assistant manager in the General affairs department. His direct supervisor is Ray Yen, who in turn reports to Deputy Senior Vice President, Howard Tung. Tung reports to Executive Vice President Raymond Lin.

Huang's first conversation concerning the Union with management officials, was with Raymond Lin. Lin asked Huang if he had any complaints about the company. Huang complained that before, when he made a complaint about a work related problem, he was told that he was not working enough, not conscientious, and management was unhappy. Lin replied that this is not right, and that Huang had children going to college, and needed money. Lin added that he himself needed money, but "if because of the union he could be run out of the job as well." I find that Lin's comment, although somewhat vague, is sufficient to imply a connection between the employees selection of the union and loss of jobs, in violation of Section 8(a)(1) of the Act that employees would lose jobs, if they supported the union, in violation of Section 8(a)(1) of the Act. Huang, at another point prior to the election, was taken out to breakfast by Charles Chen and Albert Shiu, who were managers of Respondent from other locations.[46] Chen began the conversation by telling Huang that he (Huang) had been working for Respondent, for a longtime, and that we (Huang and Chen) are old colleagues. Chen asked Huang to support the company, and added that Huang should think about the prospects of the company as well as "your own children are attending college, and you need

[45] The above conversation is based on the undenied testimony of Chi. Neither Chou nor Kuo testified.

[46] Chen was Respondent's Senior Vice President at Respondent's Salt Lake City, Utah office, Shiu had a similar position at Respondent's Charleston, South Carolina office.

money." Chen urged Huang "not to let the company go into difficulty."[47]

I conclude that Chen's comments, contrary to Respondent's assertions that they are "too vague to constitute a threat," are sufficient to establish a violation of the Act. By emphasizing Huang's children, college and his need of money, along with the statement not to let Respondent "go into difficulty," the implication is clear. To protect his job, and not to let the company "go into difficulty", Huang should support the company. This in my view, is simply another way of impliedly threatening that the business will close, if the union is selected, and is violative of Section 8(a)(1) of the Act.

Howard Tung and Ray Yen had several conversations between themselves, in the presence of several employees at work[48] including Huang, where the Union was discussed. Ray Yen criticized the salaries of the union employees such as McDonald's and benefits of unionized employees such as McDonalds, referred to the Union as a supermarket union, stated that the Union's health plan is not good and if employees put their money in the Union's 401(K), they would run out of money. On another occasion both Yen and Tung were talking and both said that joining a union does not mean that Respondent is moving. They added that Westinghouse had a Union, and they still moved, and the owner of Respondent is getting old, and if "comes to the worst, then they can just eliminate EGA."

During a third conversation between Tung and Yen, Tung said that if the Union comes in, then Respondent's boss, R. Chang could close the company, and if the company is closed, then they will be out of a job. Tung then questioned, who is going to maintain their wives and children.[49]

Based on these findings, I conclude that the comments of Yen and Tung although directed to each other, were in the circumstances, clearly meant to be heard by the employees who were sitting in the same work area as Yen and Tung. I find nothing unlawful about Yen's remarks in the first conversation, of criticizing the Union's benefits and referring to the Union as a supermarket union.

In the second conversation, both Yen and Tung at first mentioned that joining a union does not mean that Respondent is moving and pointed out that Westinghouse had a union and still moved. I find these comments, similar to other statements made by other supervisors and indeed in Respondent's literature, were in response to the Union's assertions that selecting the

[47] My findings above with respect to this conversation is based on the undenied and credible testimony of Huang. Neither Chen nor Shiu testified to dispute Huang's testimony. Respondent notes the fact that the conversation was in Taiwanese, while the translation at the hearing of the conversation was in Mandarin, since the interpreter did not speak Taiwanese. Respondent argues that such "double translation" is inherently unreliable. I disagree. The witness testified credibly that he was able to understand Chen, and the fact that he testified in Mandarin at trial does not detract from the reliability of the testimony.

[48] The employees and supervisors work at desks close to each other in the General Affairs department. In addition to Huang, employees Tony Chang and Rick Pao were present.

[49] The above findings based on the credible testimony of Huang. While Tung testified and denied having any discussions with Yen in front of employees, I note that Yen did not testify. While it is also true as Respondent points, that the two employees present who also allegedly overheard the remarks, also did not testify, I find this less significant. Yen is a supervisor and agent of Respondent and under their control. The two employees are not agents or representatives of the union, and are equally available to be called by both sides.

Union would assure that Respondent did not close or move. In such circumstances I conclude that these remarks, are not a threat to move and are not violative of the Act.

However when the supervisors added are the comments that Respondent's owner is getting old, and if it "comes to the worst, they can just eliminate EGA," this crossed the line into an unlawful threat. This statement is not reasonably construed as a mere response to the Union's claim, but instead an implied threat that if the Union comes in, Respondent's owner who is getting old, will "eliminate EGA," or close the facility. This statement is violative of Section 8(a)(1) and I so find.

Similarly, the comments of Tung, during the third conversation, that if the union comes in then Respondent's boss could close and cause job losses, constitutes a clear threat to close in violation of Section 8(a)(1) of the Act. I so conclude.

Jennifer Comia is employed by Respondent in its Documentation section. There are seven employees in her department, supervised by Betty Ng. Comia was on maternity leave when the organizational campaign began. She returned to work on June 17. Shortly after her return to work, Ng called all of the employees into a meeting in a conference room at Respondent's facility in Morristown, N. J. Ng told the employees that the Union is not good for the employees and is not beneficial for them. She added that the Union has no experience in shipping, deals with only blue collar workers such as KFC, Dockers and cemetery workers and is not good for the employees family and others. Ng also had a one on one meeting with Comia as well as other employees in the department. During this meeting Ng told Comia to open her eyes and her mind, think about her family, and said the "Union is not good for you."[50]

Contrary to General Counsel, I find nothing unlawful about any of the comments made by Ng to Comia and to the employees at the meetings. As I have found above, comments such as the Union is "no good" or "not good for you", are not considered to be threats, but lawful statements of opinion protected by 8(c) of the Act. Similarly, the reference to the Union not having experience in shipping and representing blue collar workers only, are also not unlawful. I shall therefore recommend dismissal of the complaint allegations that Ng unlawfully threatened employees with loss of benefits.

On the day of the election, Comia received a phone call in the office from Jay Buckley, Respondent's Deputy Senior Vice President in charge of the business department. Although Buckley did not directly supervise Comia, he had gotten to know her over the years, so he felt comfortable calling her to discuss the election. Buckley told Comia that today is an important day, and he hopes that she will support the company and vote "No". Buckley also mentioned that things had gotten "ugly" in Los Angeles, that there was a very bad atmosphere there, nobody talks to each other, and "nobody can touch any body's job."[51]

I find nothing unlawful in the above comments of Buckley. I do not construe these remarks as any kind of a threat by Respondent to take any action. Buckley was merely pointing out his opinion of some problems in Los Angeles, where a Union represents employees. I find these statements to be protected by Section 8(c) of the Act, and not violative of the Act.

[50] The above findings are based on the undenied testimony of Comia. Ng did not testify.

[51] The above findings are based on a compilation of the credited portions of the testimony of Buckley and Comia.

Millie Ha was also employed by Respondent in the Documentation department. Her direct supervisor is Roseanne Panepinto. A few months prior to the election, Panepinto asked Ha to come into the kitchen at Morristown to meet with her. Panepinto informed Ha that at first she thought the union would be great. However after discussing it with her husband, who had bad experiences with it, she did not think it was a good idea. Panepinto also said that if the employees join a union, there is a possibility of a strike, and that she did not think that Ha would want to do that and to stand outside striking. She also told Ha that she should read the campaign material being circulated and then make her own decision. Subsequently, Panepinto conducted a group meeting of employees under her supervision, where she essentially repeated the comments that she made to Ha, about her husbands bad experiences with unions and the possibility of strike. Panepinto told the group as she had told Ha, that it is up to the employees if they wanted to join and they should make their own decision.[52]

Contrary to General Counsel, I find nothing unlawful in any of the statements made by Panepinto at either the individual or group meetings. She was merely giving her opinion, protected by Section 8(c) of the Act, that employees should not support the union, based in past on her husbands experiences with unions. Moreover, Panepinto's references to the possibility of a strike and her asserting that Ha would not want to go on strike and stand outside striking, does not in my view constitute either an implied threat by Respondent of retaliation for striking or an implied message that strikes are inevitable. I therefore find nothing unlawful in these statements by Panepinto.[53]

Sherry Yao works for Respondent in the Traffic Import department. Her direct supervisor is Angela Tsoi who reports to Dan Grogg who in turn reports to EVP Jimmy Kuo. After Yao signed her card for the Union and before the election, Kuo called Yao on the phone and asked her to come into his office. He told Yao that the Union is not good for employees, that it is controlled by the mafia, and that the Union will not be able to get the employees too many benefits. I find nothing unlawful in these statements of Kuo. As noted above, comments such as the Union is no good for employees, and is controlled by the mafia are protected by 8(c) of the Act. *Newsday, supra; Salvation Army, supra; Camvac, supra; Sears Roebuck, supra.* Further the remarks that Kuo felt that the Union will not be able to get employees too many benefits is also a protected statement of opinion, rather than a threat of any action by Respondent.

Yao was also spoken to about the Union by Charlie Chen. He invited Yao out to lunch, a few days before the election. During the lunch, Chen told Yao that the union is no good, the union is not strong enough and won't get the employees many benefits, the union is connected to the Mafiosi, and it represents people like Kentucky Fried Chicken and Korean supermarkets. Yao asked if Respondent intended to move out of New Jersey. Chen replied "I didn't think so." This conversation was similar to the discussion between Yao and Kuo, and for the same reasons detailed above, I find nothing unlawful about any of the above comments made by Chen to Yao.

Andy Chien is another employee of Respondent assigned to Import Traffic. His direct supervisor is Francis Marrone. One evening, at about 5:30 pm, Marrone spoke to Chien in the office. Marrone told Chien that it is not necessarily a benefit for Chien to join the union.

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[52] Based on a compilation of the credible portions of the testimony of Ha and Panepinto, which are not in significant conflict, as to these statements.

[53] During her conversation with Ha, Panepinto as I detail below, made other comments which could be construed as an unlawful interrogation and which will be evaluated *infra.*

Marrone added that his father or one of his relatives had joined a union, and it turned out not to be beneficial. Chien made no response.[54] I once again find nothing unlawful in Marrone stating his opinion that "it is not necessarily a benefit" for Chien to join the union or in pointing out his relatives experiences with a union was not beneficial.[55]

On July 17, Respondent distributed a letter signed by eight of its supervisors to its employees. The complaint alleges that in this letter Respondent threatened employees with loss of benefits, or other reprisals, if they continue to support the Union. This letter is set forth below:

> July 17, 2002
>
> Dear Evergreen America co-worker,
>
> Over the past weeks, many of you have been aware that your department managers were busy working with the anti-Local 1964 campaign. Why? Not for promises of advancement or other financial gain. We have volunteered because we care deeply what happens to Evergreen America Corp.
>
> Remember, we too have established roots in the North Jersey community and, like you, we have homes here and our children go to school here. We want to stay here. The guarantee directly from EGA management to stay put in Northern New Jersey has justified our faith in the company and we are grateful.
>
> We care deeply that the EGA we all have built over the years will change forever for the worse if Local 1964 is permitted to represent the employees of EGA. We care that the largest container lines will be impacted in a negative way forever. We care that a choice for Local 1964 will prevent what could be – greatness.
>
> All of our managers have come up through the company. EGA has always, and still does, practice a policy of promotion form within. Under a union environment, this may not be possible. We all have had to work very hard over the years. Things have not always been easy for us. We are like all EGA employees. Many EGA managers have been asked, "Why do you stay?" Our answer is: In EGA, we see a *good* company that could be *great.*
>
> Top management at Evergreen America, as well as Evergreen Taipei, have tried to ask for your continued support over the past

[54] Based on the undenied testimony of Chien. Marrone did not testify.

[55] I note as argued by Respondent, that there is no complaint allegation alleging this conduct to be violative of the Act. More importantly, the complaint does not even allege Marrone to be a supervisor or agent of Respondent. In view of my findings above that Marrone's statements to Chien are not violative of the Act, I need not decide whether these procedural infirmities would preclude finding a violation based upon Marrone's conduct.

few weeks. We ask that you give them this chance for greatness.

We have seen many carriers come and go over the years. Through this, EGA has grown to become a powerful force in the industry. As Evergreen America grew, so too have salaries and benefits for all employees. Today, EGA ranks as one of the leaders in the steamship industry in both salary and benefits in North America.

As Evergreen America grew so quickly, we may have seemed to become a less personal company overall. This was never intended. If this occurred, we all need to improve. This cannot be fixed with Local 1964. In fact, Local 1964 will eliminate any opportunity to become more personal. EGA has always practiced an "open door" policy. Employees have always been encouraged to discuss matters with all managers from section heads to the chairman.

Many of you have taken the opportunity to discuss matters with your supervisors, especially section heads and department heads. Many positive results have come from this policy. Perhaps much more good could come if we keep EGA "open" and not "closed," as it will become in a union environment. Most of you have established good relationships with your section and department heads and we have been able to work together successfully.

Most of us agree that EGA is a good company to be part of. Most of you realize that EGA could be a great company. EGA has this potential that has not yet been realized. This potential to become a great company is very close. We will never be able to achieve greatness within the union atmosphere.

We *trust* and we *know* that Evergreen America management is committed to achieving greatness. And to improving this company and its employees. Do not settle for mediocrity. Do not give up your future. Together, we can realize the dream of all.

Help us make Evergreen America the great company that it has the potential to be! Decline unionization at this time. Give us the chance to be come great together.

Sincerely,

I conclude that several statements in the letter, constitute threats of reprisals and loss of benefits, as alleged in the complaint. In paragraph three, the letter states, "we care deeply that the EGA we have all built over the years will change forever for the worse if Local 1964 is permitted to represent the employees of EGA." It goes on to say that the company "will be impacted in a negative way forever," and the choice of the union will prevent "greatness." These statements, although somewhat vague, in my view represent implied threats by Respondent to make things "worse" for employees if they select the Union as their representative. I note that the letter does not explain the collective bargaining process, or opine that as a result of collective bargaining employees could be worse off than they were without a

Union. It simply equates representation of the Union with Respondent "changing forever for the worse," which implies that Respondent will retaliate against its employees, because they choose to be represented by a union. *Memc Electronic Materials,* 342 NLRB #119 ALJD, slip op. p. 22 (2004), (Employees who chose unions "usually loose"); *Chariot Marine Fabricators,* 335 NLRB 334, 349 (2001), (Ability of employer to provide best benefits dependent on absence of outside intervention).

Additionally, I conclude that the statement that Respondent has a policy of promoting from within, but "under a union environment, this may not be possible," is simply an unlawful threat to change its promotion policy "under a union environment." Unlike the statement of Tung that I have found above to be lawful, because he compared what he viewed as the promotion policy of union contracts based on seniority alone to Respondent's policy, which he viewed as providing better opportunities for employees, this statement is devoid of any such comparison. It does not talk about the collective bargaining process, or what the supervisors viewed as to what union contracts provide with respect to seniority, but makes a statement equating mere selection of the union, (i.e. a union environment) with a change in Respondent's policy of promoting from within. Further there is not even an assertion made by Respondent that union contracts prohibit or discourage promotions from within. Indeed, Respondent would be hard pressed to make such an argument, since it makes little sense for a union to urge that promotions be made from outside the company, since that would clearly be contrary to the interest of the unit employees whom it represents. Therefore, I conclude that this statement reasonably can be construed as an implied threat by Respondent to change its promotion policy, if the employees chose union representation, in violation of Section 8(a)(1) of the Act.

The complaint also alleges that unlawful threats were made by Gaetano (Guy) Sinischalchi. However, the evidence involving these threats concerns alleged conversations between Sinischalchi and Mike Gunshefski. Since it is necessary for me to make a number of credibility resolutions *vis à vis,* the testimony of Sinischalchi and Gunshefski, in connection with the complaint allegations concerning Gunshefski's discharge, I shall defer ruling on the alleged statements made by Sinischalchi to Gunshefski, to my consideration of that complaint allegation.

B. Alleged Interrogations

In the first week of April, Kevin Huang asked Chris Yu what she knew about the Union, if she had heard any of her co-workers discussing it and if anyone had asked her to sign a card. Yu replied "No" to each inquiry, since at that time she had not heard anything about a union and had not yet signed a card. Huang then told Yu that the Union is no good, and asked her if she had any suggestions for him about improving the working environment . Yu replied that important decisions should be made in USA not in Taipei.

On the day before the election, Huang called Yu at home on the phone. He asked her if other employees that she knew will be supporting the Union, specifically mentioning by name, Christina Truong and Michelle Shen. Yu replied "I have no idea." Huang then told Yu that if the employees chose the Union, the company would close, which I have found above to be an unlawful threat to close.

On or about July 1, Huang called Yu into his office. Huang began by telling Yu, "congratulations, you have been promoted." Yu replied, "thank you."[56] Huang then asked Yu if

[56] Yu was surprised that she was promoted, since her last evaluation was not good, she
Continued

she decided which side to choose in the upcoming election. Yu replied "No", "I still have no idea, I haven't chosen a side yet." Huang then said that the company "treats the employees very good, don't let the company down." He also told Yu once again during this conversation that "the union is no good."

As I have detailed above, in May, Michele Shen was unlawfully threatened with plant closure by Huang in a meeting at Respondent's facility. Two or three weeks before the election, Huang telephoned Shen. Huang asked Shen to support the company, and then asked Shen if she thinks that Yu and Christina Troung will support the company. Shen replied that in her opinion, both Yu and Troung will support the company.[57]

On April 23, Shirley Chiu made a business trip to Jamaica, accompanied by Junior V. P. Stephen Tan. During the flight, Tan asked Chiu if she had heard about the organizing activity? Chiu replied "No, I didn't hear about it."[58] A few weeks prior to the election, Jason Chuang, a Deputy V.P. in Logistics, spoke with Wayne Ting. Chuang asked Ting how he felt about what was going on at work, and added that Ting had good potential to become a Deputy Manager in Logistics. Chuang urged Ting to "think about that."

A few days after the election, Y. T. Lin called Ting into a conference room. Lin asked Ting in an angry voice, "Why did you do it?" Ting replied that he doesn't understand what takes place in Evergreen's middle management, which is not fair. Ting added that he was sorry that Lin was going to be retired because of this. Lin repeated several times, "why did you do it?" in a loud and angry manner. [59]

Barbara Chi twice met with Yeh in a meeting room a Respondent's facility, where the union was discussed. Yeh told Chi at both meetings that the union does not necessarily protect employees from moving or closing, and at the second, mentioned G.E. and Ford, as companies that moved or closed, although they were unionized. As detailed above, I did not find these statements to be unlawful, primarily because they were in response to the union's assertion that in effect selecting the union would assure employees that Respondent would not close or move. During the second of these conversations, Yeh asked Chi if she was sure what the union was about, why she wanted a union, and whether she thought the union could really protect her.

Chi responded that there have been so many inequities over the years, including the fact that Yeh himself, as well as other employees did not get a promotion.[60] Chi also told Yeh that she was afraid that she will be fired and she was scared. I have found above that after the election, David Chou unlawfully threatened Chi with reprisals because of her Union activity, by telling her, "now I can't help you anymore," and Respondent could assign workers from Taipei to do work of Respondent's employees. Preceding these comments, Chou asked Chi why she had lead the campaign? He added that Capt. Kuo a Vice President from Taiwan had mentioned Chi's name to Chou as a leader of "this situation," asked Chi why she didn't just "hide yourself away. Why did you do that?" Chi did not respond to Chou's questions.

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received no raise last year, and was told at her evaluation that she needed to improve and be more careful.

[57] As detailed above Huang did not testify. The above findings are based on the credible testimony of Yu and Shen.

[58] Based on the undenied testimony of Chiu. Tan did not testify.

[59] Neither Lin nor Chuang testified. Thus Ting's unrebutted testimony is credited as to these conversations.

[60] Yeh had been Chi's former manager.

Jennifer Comia attended a union meeting, after her supervisor Betty Ng had encouraged her and other employees to attend and compare what the company and union were saying. The day after the meeting, Ng called Comia in and asked Comia what she thought about the meeting, and if she had asked any questions. Comia replied "No" that she had just sat down and listened. Ng also asked Comia who else attended the meeting, what the employees were saying and what was discussed at the meeting. Comia did not answer.

Shortly before the election, the union conducted a meeting at the Westin Hotel on a Saturday. Comia did not attend that meeting. However, on the Monday after the meeting, Ng called a meeting of her department which consisted of seven employees. Ng appeared to be very upset and said while crying that she couldn't believe that the people she though that were close to her went to the meeting. Ng did not mention the names of the employees[61] to whom she was referring, nor did she indicate how she found out about who had attended the meeting. Neither Comia nor any of the other employees present responded to Ng's remarks.[62]

I have found above that Roseanne Ponepinto met with all the employees in her department in one on one conversations and gave her opinion, based on her husband's experiences with a union, that the union is not a good idea for Respondent's employees, and talked about the possibility of a strike. I found nothing unlawful about those comments. However, during Panepinto's conversation with Ha, Panepinto began by asking Ha how she feels about the union, and does she have any idea of what she feels about it? Ha replied that she was not familiar with it right now, but she was trying to get some information.[63]

A few days before the election, the Business department hosted a dinner at a Japanese restaurant. The Documentation department was invited, as well as employees from some other departments. Three employees from the Documentation department attended, plus two managers. During the course of the dinner, two employees were teasing Ha about the union and said to Jay Buckley, referring to Ha, "she's for the union." Buckley said nothing at the time. After the dinner, as they were leaving, Buckley approached Ha and said to her, "you're not really for the union, are you?" Ha replied, "No."[64] Buckley responded, "why are these girls saying that?" Ha replied that "they always tease me." Buckley said "good" The next day, Buckley telephoned Ha and said "Thank you for your support."[65]

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[61] After the above meeting with Ng, Comia found out that employees Doris _____, Mary _____ and Mei-Lin _____, had attended the union meeting at the Westin.

[62] The above findings are based on the undenied testimony of Comia. As noted Ng did not testify. While Comia's testimony concerning Ng's statements expressing her disappointment with employees who attended the Union meeting was somewhat uncertain, I am still inclined to credit her testimony in this regard, as reflected above. The failure of Respondent to call Ng to contradict Comia's testimony tips the scales in favor of crediting Comia's version of events.

[63] While Panepinto denied asking Ha how she felt about the union, I credit Ha. She is still an employee of Respondent, without any interest in the proceeding. Thus her testimony where it is adverse to her employer is considered to be against her self interest and there more worthy of belief. *Meyers Transportation of New York,* 338 NLRB 958, 968 (2003); *Stanford Realty Assoc.,* 306 NLRB 1061, 1064 (1992); *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn. 2 (1961), *enfd.* as *mod.* 308 F.2d 89 (5th Cir. 1962).

[64] In fact Ha had previously signed a card for the union.

[65] The above findings based on the credited testimony of Ha. Buckley denied discussing, or mentioning the union with Ha during the dinner, although he did recall some other employees discussing the election. I credit Ha's account as detailed above. As noted above, Ha is also a current employee of Respondent, and, I find her testimony more worthy of belief. *Meyers*

Continued

Kerry Brogan is also employed by Respondent in the Documentation department. During the organizing campaign Brogan was employed as a receptionist in the General Affairs department. Brogan attended a lunch shortly before the election, along with members of her department plus supervisors Jack Wang and Howard Tung. During the lunch, Wang asked Brogan how people felt at work about the Union. Brogan replied that there was a lot of concern about moving the company, since jobs had been transferred to another office. She also said that everybody had their own reason.[66]

Sometime in early July, a meeting was conducted during lunch in Respondent's cafeteria with about 30 employees present. Thomas Chen Respondent's president, and Capt. Kuo, Respondent's former chairman conducted the meeting. Kuo spoke and declared the meeting to be an open forum, asking employees to speak about anything that is on their minds, Maria Magbanua spoke up and raised questions about Respondent's sick leave policy. She complained about having to give Respondent a reason if she called in sick, and asked why employees were required to give a reason when asking for a sick day. Kuo responded that he will speak to personnel about that and maybe that will be changed.

Immediately after the meeting, Dan Grogg called Magbanua to his office. He asked her why she had asked that question at the meeting. She replied that it was on her mind, and she thought it was an open discussion. He told Magbanua that he wanted to make sure that the comment did not come from him but from Documentation. Grogg then asked Magbanua if she "wanted to be a shop steward?" Magbanua was kind of surprised by that inquiry, and did not respond.[67]

Interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176 (1984) *affd sub nom; Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In determining whether a supervisor's questions to an employee about union or concerted activities constitutes an unlawful interrogation, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrains or coerce employees in the exercise of their Section 7 rights. *Heartshare Human Services of New York,* 339 NLRB 842, 843 (2003); *Rossmore, supra.*

Under the totality of circumstances approach, the Board examines factors such as the employer's background (i.e. whether there is a history of employer hostility) the nature of the information sought, place and method of the interrogation (e.g. whether the employee was

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Transportation, supra; Georgia Rug, supra.

[66] The above finding based on the credited testimony of Brogan. While Tung who was present at the lunch, denied that any managers spoke to employees about the union, Wang who I find asked Brogan how the employees felt about the union did not testify. Further Brogan is also still employed by Respondent and her testimony, also as with Comia and Ha is more worthy of belief for that reason. *Meyers Transportation, supra,* and cases cited therein.

[67] I credit Magbanua over Grogg's denial that he ever had such a conversation with her. Again Magbanua is also a current employee of Respondent, and although I have considered Respondent's argument that she did not mention this statement in the course of numerous statements to the Region, I still find her testimony credible. Respondent also argues that Magbanua offers no reason why Grogg "out of the blue, would ask her if she wanted to be shop steward." I disagree. It is clear that Grogg was annoyed that Magbanua had registered a complaint about Respondent's sick leave policy, since he appeared to somehow believe it was a reflection on him. Thus his inquiry about Magbanua wanting to be shop steward is a logical extension of his dissatisfaction at her complaining about Respondent's policies.

called from work to the boss's office), whether the tone of the questions was hostile or threatening, and the truthfulness of the reply. *Bourne v. NLRB,* 332 F.2d 47, 48 (2nd Cir. 1969). Another important though not conclusive factor considered by the Board is whether the interrogated employee is an open and active union supporter. *Demco N.Y. Corp.,* 337 NLRB 850, 851 (2002); *Pym Corp.,* 343 NLRB #124 ALJD slip op. p. 14-15 (2004); *Gloria Oil & Gas Co.,* 337 NLRB 1120, 1122 (2002); *Sundance Construction Co.,* 325 NLRB 1013 (1998); *Schwartz Mfg. Co.,* 289 NLRB 874, 888 (1988).

In assessing the legality of the fourteen instances of employees being questioned by supervisors about their union activities or sentiments as detailed above, I emphasize the importance of the latter factor, which the Board finds highly significant. Here, none of the employees questioned were known or open union supporters at the time of the questioning. To the contrary, the record reveals that the employees were extremely careful to keep their union activities secret from Respondent. Thus when many employees signed cards, rather then handing them to Barbara Chi, one of the primary union organizers, it was decided that the employees would place the cards in Barbara Chi's car. In that connection, Chi would give employees the combination to her car, so they could enter her car when she was not present. It is obvious that employees were petrified that Respondent would find out about their signing cards, which is demonstrated by the fact that many of the card signers requested and received assurances from the solicitors that the cards would be confidential, and that Respondent would not find out that they had signed. In such circumstances, I find that the fact that none of the employees questioned were open union adherents to be highly significant factors in concluding that all of the questioning described above reasonably tended to interfere with restrain and coerce the employees of Respondent, in the exercise of their Section 7 rights.

The above described incidents consist of fourteen instances of Respondent's supervisors questioning employees about union activities[68] of themselves or other employees. A number of these conversations included other unlawful conduct by the supervisors involved or other expressions of hostility toward unions and union activities.[69] Such evidence is highly indicative of coercive conduct. *Parts Depot,* 332 NLRB 670, 673 (2000); *Cumberland Farms Inc.,* 307 NLRB 1479 (1992); *Advance Waste Systems,* 306 NLRB 1020 (1992); *Demco, supra* at 851; *Schwartz Mfg., supra.*

Additionally in each and every instance described above, it was the supervisor involved who initiated the discussions about union activity, which the Board considers to be another indication of coercive conduct. *Sundance Construction Management,* 325 NLRB 1013 (1998); *La Gloria, supra.* Another factor which is considered supportive of a finding of coerciveness is where the inquiry is made concerning the union activities or feelings of employees other than the employee to whom the questions are addressed. *Medcare Associates*, 330 NLRB 935, 943 (2000); *Excel Corp.,* 324 NLRB 416, 418 (1997); *Gardner Engineering,* 313 NLRB 755 (1994); *Sundance, supra; Perdue Farms* NLRB, 144 F. 3d 830, 835 (D.C. Cir 1993). Here a number of the interrogations of employees inquired about the union activities of other employees.[70]

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[68] I conclude that the questions posed to Wayne Ting by Chuang of "how he felt about what was going on at work?" and by Y. T. Lin after days of the election of "why did you do it?", based on the timing and context of the conversations, were clearly related to the union. See, *Gloria Gas, supra.*

[69] Examples include Kevin Huang's questioning of Yu, Chuang's questions of Ting, Chou's interrogating Chi, and Panepinto's interrogation of Ha.

[70] They include Huang's questioning of Yu and Shen, and Ng's interrogation of Comia concerning who attended union meetings and what employees were saying at such meetings.

Also the facts reveal that in a number of the above described instances the employees either did not answer or gave evasive or untruthful replies, which is also supportive of finding the questioning to be coercive. *Medcare Associates, supra,* at 940 (Employees failed to give responses and asked to be allowed to remain neutral); *Grass Valley Grocery Outlet,* 338 NLRB 877, fn 1 (2003). (Employee gave evasive reply); *E.Z. Recycling,* 331 NLRB 750 fn 6 (2000). (Employee responded untruthfully).

Employees who either refused to respond or gave untruthful replies, include Yu and Shen who gave untruthful replies to Huang concerning questions about whether other particular employees would support the company, Ting by failing to respond to Chung's question of how he felt about what was going on at work, Comia's refusal to answer Ng's inquiries about who attended the union meeting and what was discussed there, Ha giving an untruthful reply to Buckley when he asked her if she was "really for the Union," and Magbanua's failure to respond to Grogg's question of whether she "wanted to be shop steward."[71]

A few of the instances described above, if considered separately, would probably not be considered coercive.[72] However, these interrogations must be evaluated in light of the other clearly unlawful interrogations found above, as well as the other unlawful conduct of unlawful threats which I have detailed above, which occurred during the same time period as these interrogations. As the Board has observed, "suggestions conveyed in one conversation may contribute to the impact in the next. By the same token, a question that might seem innocuous in its immediate contest may, in the light of later events, acquire a more ominous tone." *Medcare Associates, supra* at 940. Thus the Board supported by the Courts will find an otherwise lawful interrogation when considered by itself to be unlawful, when it occurs in the context of other unfair practices committed by the Employer both before or after the particular interrogation in question. *Palagonia Baking Co.,* 339 NLRB 515, 526 (2003); *Seton Co.,* 332 NLRB 979, 982 (2000); *Medcare Associates, supra; Cumberland Farms, supra; Excel, supra; EDP Medical Computer,* 284 NLRB 1232, 1264 (1987); *Timsco v. NLRB,* 819 F. 2d 1173 (D.C. Cir. 1987). (Court finds that while only two instances of interrogations were individually coercive, that the cumulative effect of all seven exchanges made all instances coercive.)

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent coercively interrogated employees by the conduct of Huang (2 conversations with Yu, one with Shen), Tan (interrogation of Chui), Chuang's questioning of Ting, Y. T. Lin (questioning of Ting), Yeh and Chou by their interrogations of Chi, Grogg's interrogation of Magbanua, Panepinto and Buckley's interrogations of Ha, Wang's interrogation of Brogan and Ng's interrogation of Comia in their conversation about attendance at union meetings.

With respect to the statement made by Ng in the presence of Comia and other employees, that she couldn't believe that the people that were close to her went to the meeting (referring to a union meeting the day before), I do not find the remarks to be an interrogation. It was not in the form of a question, and was not a statement that called for a response. However, while I do not find these comments to be an unlawful interrogation, I do conclude that they are unlawful. The remarks by Ng suggesting that Ng was aware of which employees attended the union meeting the day before, gave the impression of surveillance of union activities, an independent violation of Section 8(a)(1) of the Act. I so find. *Medcare Associates, supra* at 943; *Adderly Industries,* 322 NLRB 1016, 1024 (1997); *Flexsteel Industries,* 311 NLRB 257

[71] Indeed Magbanua testified that she was kind of surprised by that question, and therefore did not answer.

[72] These include Tan's inquiry of Chiu, and Wang's inquiry of Brogan.

(1993); *United Charter Service,* 306 NLRB 150, 150-151 (1992).

Respondent in its reply brief recognized that Ng's statement would likely be considered unlawful on this basis, but raises the issue that the complaint does not allege that Respondent created the impression of surveillance by the conduct of Ng. However, the complaint does allege that Ng violated the Act by interrogating employees,[73] and the testimony offered with respect to this allegation potentially encompassed the above statement by Ng. Respondent did not object to the testimony, when offered, and cross-examined Comia vigorously with respect to Ng's statement. I conclude therefore that Ng's conduct was fully litigated,[74] and it is appropriate to find such a violation.

VII. THE ALLEGED SOLICITATION OF GRIEVANCES'S AND PROMISES OF BENEFIT

Sometime between April 15 and the election in mid July, Jason Chuang and Anderson Kao took three employees from the Intermodal section, Paolo Magbanua, Sam Wang and Ian Wang out to lunch at a Chinese restaurant called Mr. Chou's in Morristown, N.J. Kao asked Magbanua how he was doing at work, and if there were any problems with his job. Magbanua replied that it was okay, there were no problems and he was learning the work okay. Kao said that the company is in tough times now, but don't worry the employees are going to get a raise. Kao added that the company is "changing for the better."

Sometime after this lunch, Kao spoke to Paolo Magbanua at the Morristown facility. Kao sat next to Magbanua at the office. Kao turned his chair towards Magbanua, and asked Magbanua to write down any suggestions that he might have to "improve the company." Magbanua wrote down flextime and a radio in the cafeteria. Kao told him to pass the paper on to other employees in the department, and Magbanua did so.

Dan Grogg and Guy Siniscalchi conducted several meetings of the Traffic Export department, during the months of May through July. During these meetings Grogg and Siniscalchi asked the employees for suggestions for improvements in the company and asked the employees to write them down, and they would in turn bring the employees suggestions to management. Mike Kelly suggested that Respondent allow casual dress every day.[75] Other suggestions made by employees included flexibility in regard to lateness, i.e., if an employee is late, they could make up the time.[76] Additionally employees suggested more vacation time, more holidays, a radio in the cafeteria, and permitting family members to attend Respondent's Christmas party.

At subsequent meetings, Grogg notified the employees that some of the suggestions had been approved, including casual dress year round, and 10 minutes flexibility in lateness. Grogg also informed the employees that Respondent would be installing a T.V. in the cafeteria.

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[73] Moreover the complaint does include an allegation, that Respondent created the impression of surveillance in violation of the Act, by the conduct of supervisor Eddie Lou. Since that alleged incident involved Mike Gunshefski, I shall defer resolution of this complaint allegation until the portion of this decision relating to Gunshefski's termination.

[74] *Casino Ready Mix, supra; Five Captine Inc.,* 331 NLRB 1165, 1183 (2000); *Williams Pipeline,* 315 NLRB 630 (1999); *Pergament United Sales, supra; Miller Industries, supra.*

[75] At that time Respondent permitted casual dress only on Fridays.

[76] Magbanua recalled that years before, when she was in the Documentation department a fellow employee Maria Agosto had requested 10 minutes of flexibility in regard to lateness. The suggestions was rejected at that time.

He told them that although the employees had asked for a radio, Respondent felt that there were so many different types of music, it would be difficult to have a radio, so it was decided to install a T.V. instead.[77]

David Yang was employed by Respondent as a port captain. His immediate supervisor was Johnny Chen, who in turn reported to C. L. Chen, Junior V.P. in Respondent's Marine department. The Marine department also included two clerks, Teresa Wong and Heidi, who were in the bargaining unit for the election. Although C. L. Chen regularly conducted monthly meetings for the department where related matters are discussed, in early May Chen called a special meeting of the department. Present were 4 port captains,[78] one port engineer, the two clerks, Wong and Heidi, one port engineer, Johnny Chen and C. L. Chen. C. L. Chen said that once the union comes, it means that employees are not happy with the company. Chen added that he wants to hear what the complaints are about the company, why they are not happy with the company, and what the company can do to improve, and he can take it to upper management. He also told the employees that he wants to see if the company can change the points that they are not happy with, and "then maybe you can change your mind."

Yang and another port captain made some complaints about work related issues such as how the Regions were divided, and the fact that employees are reassigned too frequently. Wong also made a complaint related to her work, something about EPI. Chen stated that he will bring to upper management all the complaints made by employees. (The above findings based on the testimony of David Yang. Chen did not testify, so Yang's testimony which I found to be credible stands unrebutted.)

I have found above that during a conversation in the meeting room at Morristown, Kevin Huang unlawfully interrogated Chris Yu by asking her about the feelings of herself and other employees about the Union. During that conversation, Huang also asked Yu if she had any suggestions about improving the work environment. Yu replied that in her opinion, important decisions should be made in the USA, instead of in Taipei.

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[77] The above findings with respect to the meetings and conversations between Kao, Chuang, Grogg and Siniscalchi and employees is based on the credible testimony of Maria and Paolo Magbanua. I note that Kao and Chuang did not testify, so Paolo's testimony stands unrebutted. While Grogg and Siniscalchi both denied the testimony of Maria Magbanua that they had asked employees for suggestions for improvements, asked them to write down suggestions, or brought such suggesting to management, I do not credit their denials in this regard. In addition to comparative demeanor considerations, I note that Maria's testimony is similar to the credited and undenied testimony of Paolo concerning his discussions with Kao. Further, although as noted by Respondent, Gunshefski who also testified about the meetings, did not corroborate, Maria Magbanua that employees were asked to or did write down suggestions to be brought to management, he did corroborate Maria, contrary to the testimony of Grogg and Siniscalchi, that they did solicit suggestions from employees about changes. Further, Siniscalchi admitted that he and Grogg discussed among themselves and were trying to figure out why employees were unhappy with their work environment. Thus, since Siniscalchi admitted that he and Grogg "were trying to figure out" why employees were unhappy, it is logical to conclude which I do, consistent with the testimony of Magbanua, that they would ask employees about why they were unhappy, and try to bring these concerns to management.

[78] At the time of the meeting, port captains were still potentially in the unit, since the petition had included them, and the stipulated Election Agreement, excluding them from the unit had not yet been reached.

Sometime in early May, shortly after Shirley Chiu returned from her business trip, wherein I found that she was unlawfully interrogated by Stephen Tan, Chiu was called into the office of Raymond Lin. Lin asked Chiu her opinion to towards the company. She replied that she didn't have much opinions, but she was concerned about the job security. Lin replied "don't worry and the company will improve to meet the employees requirements," because he (Lin) is now in a high position which can meet the employees requirements. Shirley Chiu also had two one on one conversations, prior to the election, in a meeting room at Respondent's facility. The first one was with Jason Wu, her direct supervisor, and the second with her former supervisor Terry Chang. Both conversations were similar. Wu told Chiu that the company would improve, would treat us better. Chang said to Chiu that the company would improve, it would be rather quick, and she would see it very quick. In each case Chiu responded that she just wanted to have a job.[79]

In early July, Kumad Patel was spoken to by Chuck Yeh concerning the union, wherein he told Patel about other unionized companies that had moved, even though they had a union. As noted, I did not find these comments unlawful. During this conversation, Yeh also informed Patel that even though the company is not doing well, Patel will be getting a raise of $400 a month to make up for past years where the raise was not as good. This was the first time that Patel had ever been informed of her raise by Yeh or another V.P.

Patel was also spoken to by Y. T. Lin. Lin asked her to support the company, and added that the company had made mistakes in the past and are trying to change and improve. Lin asked Patel to give the company a chance one more time and the company will improve.

On or about June 10, Y. T. Lin asked Wayne Ting to go to lunch. Thus was the first time that Lin had invited Ting out to lunch. Ting and Lin went to an Italian restaurant in Morristown. During the lunch, Lin asked Ting how he feels about his job, was he happy, and if he had any problems or difficulties at work. Lin also asked if Ting had any problems with his supervisor or his fellow workers. Ting replied that he had a few incidents and problems with his previous manager, Jeff Tung when Ting worked in Equipment Control.

Ting met with Capt. Kuo about a month and a half before the election. Kuo called Ting on the phone at work and asked Ting to come to a conference room near managements offices at Morristown. Although Capt. Kuo was from Evergreen Marine's Taipei office, he did have his own office at Morristown. In fact, Ting had never met Capt. Kuo before, and he felt kind of surprised when Kuo met him at the door, and held Ting's shoulders when walking into the room. Kuo asked Ting how he was doing, how long had he been with the company, and if he had any problems, complaints or issues with any manager or with his job. Kuo also asked Ting about his concussion that he suffered at work in 2002.[80] They also discussed problems Ting had with his previous manager, Jeff Tung. Kuo also asked Ting what the company could do to change. Kuo added that things are changing, and there would be a lot of changes for the better. Kuo concluded by thanking Ting for his comments, and stated that he will talk to the people involved.

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[79] The above based on the credited testimony of Shirley Chiu. Although Wu denied making the comments attributed to him by Chiu, neither Lin nor Chang testified. I rely in part on the fact that statements made by Chang and Lin to Chiu, were similar to the statements made to her by Wu, in my decision to credit Chiu's account of her conversation with Wu.

[80] Ting testified that he had suffered a concussion in April of 2001, and he was upset that no one from the company had visited him. Ting found it quite unusual that this would be mentioned in 2002, over a year later.

Ting was also taken to lunch by Anderson Ko and Jason Chuang. Also present were employees Ian Wang and George Patronov. During the lunch, Ting was asked about any problems on the job and how he was doing at Intermodal. Ting responded that it was okay, no problems, he was learning the work.

A few weeks before the election, Jason Chuang, Ting's immediate supervisor spoke to Ting in the lunch room. He asked Ting how he feels about what is going on at work? Chuang added that Ting had good potential to become a deputy manager in the Logistic department, because his record in the company is very good. Chuang asked Ting to think about that. Ting smiled and made no response to Chuang's questions and statements.

In late April or early May, David Chou asked Barbara Chi to come to the dining area for a short meeting. Chou informed Chi that the company knew that Chi was part of the labor union. Chou added that they "knew about these things and will probably give you a promotion or give you a raise."[81]

Chi also met with Y. T. Lin during the campaign in a meeting room. Y. T. Lin asked Chi to give the company an opportunity and not to join the union. Lin continued that the company knew that it was wrong in some situations, and asked Chi to give the company an opportunity to correct it. Chi made no response. Chi was very surprised that Lin had even spoken to her. This was the first time that she had spoken to Lin on a one to one basis. Further, Chi had received a warning letter in 2001 for failing to timely collect bills. Chi felt that the warning letter was unfair, and had asked to speak to Y. T. Lin about the letter, but Lin did not want to see her at that time.

Several employees, including Sherry Yao, Millie Ha and Claire Connor were called into the office of V.P. Jimmy Kuo for one on one meetings. Kuo had never called any of these employees into his office to speak to them prior to these conversations. Kuo told Yao that the union is no good for her, it is controlled by the mafia and were just trying to take her money.[82] Kuo then asked Yao if she had any suggestions for how the company could change, or if she had been treated justly by the company. Yao replied that she had worked for Evergreen for a long time and had not been promoted. Kuo responded that it's difficult to judge why she hadn't been promoted. He surmised that Yao had not been lucky.

Kuo then told Yao to give the company another chance and the company will try to improve. He added that if Yao is still not satisfied, the employees could vote for the union next year. Claire Connor was asked by Kuo to come to his office, and after a discussion about old times, Kuo asked Connor if she had any questions. Connor asked how come she was not assistant manager, since she had been told when she was hired that after 5 years employees become assistant managers. Kuo replied that maybe Louise Yu, Connor's immediate supervisor, is a little prejudiced. Kuo asked Ha how she felt about the company and if there was anything she wanted changed. Ha complained about Respondent's policy towards lateness, but added that Respondent had recently addressed that problem by instituting a flextime policy and permitting employees to make up time up to 10 minutes, a day, if they are late. Kuo replied "Oh, that's good," and asked if there is anything else. Ha responded, "No."[83]

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[81] Based on the undenied testimony of Chi, Chou did not testify.

[82] As noted above, I did not find these comments unlawful.

[83] My findings with respect to the conversations between Jimmy Kuo and employees Yao, Ha and Connor is based on the undenied testimony of the employees. Kuo did not testify.

Sherry Yao, during the course of the campaign, wrote a letter complaining about what she considered to be mistreatment by her supervisor in 1994, when she was pregnant. She felt that because of this mistreatment, she did not dare to take early leave, and consequently had a miscarriage. This letter was circulated by the Union, during the campaign. Yao discussed this letter with Charles Chen during their lunch conversation described above, a few days before the election. As noted Chen told Yao that the Union was no good, was connected to the mafia, and represent employees at KFC and Korean supermarkets. Yao showed Chen a copy of the letter that she had written. Chen read it and said that he was very sorry that such a thing happened, and that she should have contacted him when it happened, perhaps he could have helped. She told Chen that since he worked in Salt Lake City, she would not dare ask him to interfere on her account. Chen informed Yao that he was on vacation, but he cares about what's happening between the Union and the company. Chen asked Yao to give the company another chance.

Sherry Yao, on the day of the election, spoke with two other company managers about the Union. She had asked to see Mike Liu, Dept. Mgr. of HR, about the same letter that she had discussed with Chen. Management had informed Yao that it was preparing a draft of a letter that it was hoping she would subscribe to and circulate concerning that issue, and she wanted to speak with Liu about it. After discussing the issue of the letter, Liu brought up the Union. He told Yao that the Union is not big, and asked Yao to give the company another chance. Yao complained about Respondent's grievance procedure.[84] Liu responded that he will try to change and improve the grievance procedures.

Later that same day, Mary Chen, Deputy Mgr. of the Auditing Dept., told Yao that she should support the company no matter what has happened in the past. Chen stated "give the company another chance, because the company will try to improve."

Andy Chien had a conversations with Wendy Kao, Manager in the Project Division, in the copy room of the facility. Sometime in June, Kao told Chien that the company knows it has many problems and asked Chien to give the company another opportunity. Chien then told Kao about what he considered examples of mistreatment by his supervisor Anderson Kao, including giving Chien a hard time about lateness. Wendy Kao replied that she understands and knows about it, and hopes that Chien gives the company another chance.

Chien was invited to lunch by Chen and Shiu, who were as noted above heads of Respondent's Salt Lake City and Charleston, S.C. offices respectively. They told Chien that the company is very sick and has many problems. The asked Chien to give the company another chance, it is very important. Chen added that the company will improve and will change.

Colton Huang met with Raymond Lin, in Lin's office prior to the election. Lin asked Huang if he had any complaints about the company. Huang asked about not getting a raise. Lin then asked Huang to support the company and said that he will be compensated for it.

On the evening before the election Raymond Lin called Huang at home on the phone. Lin asked Huang to support the company and said that he will compensate Huang for that.[85]

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[84] Respondent has an internal grievance procedure in place. However, Yao was not satisfied how Respondent handled her complaint through the grievance procedure, about how she was treated during her pregnancy in 1994.

[85] The above conversations between Lin and Huang all based on the undenied testimony of Huang. As noted Lin did not testify.

On May 23, Jeff Tung, on instructions from his supervisor Charles Yeh, sent an E-mail to the employees under his supervision. The E-mail reads as follows:

> Dear All,
>
> We need your suggestions and feedback on below 4 points by next Tue. Your suggestion/feedback can be a reference for company administrative direction in the future.
>
> 1. Flexible working hour, this could be job related, e.g. 8:00AM – 5 PM.
>
> 2. Compensation time, e.g. overtime can trade off with working hour.
>
> 3. Cross training, please think about both internal Department or cross Department.
>
> 4. Evaluation, e.g. self-evaluation.
>
> Thanks / Best regards

Tung testified that his immediate supervisor Charles Yeh instructed him (as well as two other supervisors who report to Yeh), to send out this E-mail to employees in their section. Yeh told the supervisors that these items had been the subject of company discussions, and Respondent wanted to know the thoughts of employees on these subjects. Several employees responded to Tung by telling him that they did not want cross training, they would like to trade paid overtime for vacation time, and that some wanted flexible hours. Tung also recalls that some employees in his department had previously mentioned some of these items to him, such as Kevin Kwon who had wanted to trade overtime for vacation days. Tung transmitted the responses made to him by employees to Yeh.

On May 23, Thomas Chen conducted a meeting of all unit employees, divided into two groups, held in a large conference room. Chen read from a speech that had been prepared beforehand, and has been introduced into the record. Chen began by stating that management had heard about discussions in the office regarding unionization, and stated that employees had approached management and expressed their concerns about a union in the work place. Chen added, "let me state very clearly that we do not believe a union is in anyone's best interest and that all of our mutual concerns can be best addressed directly and without intermediaries who are strangers to our company."

Chen then went on to address specific issues such as work transfer, job security, and working environment. He explained why Respondent had found it necessary to send some data entry work to another office. (Inability to hire additional staff and the particular project needed to be expedited.) He also said that Respondent had no immediate plans to spin off logistics, and that it planned to stay in the Morristown area.

Chen also talked about rumors which had been spreading that employee Art Pruett moved to the Charleston office to start a corporate move South. Chen explained that Pruett's transfer was effectuated at his request, to be closer to his family, and that there is no corporate plan to move South.

Chen then stated "in order to improve the work atmosphere, I have previously asked some of the Mgr's to consider what items are important to the staff. Some issues we are reviewing right now are," Chen then listed several items such as flex hours, comp time instead of overtime pay,[86] a change in managements semi annual review process, and a new cross training system. Chen concluded by adding that management is committed to "improving the way that we exchange information, …and if you have any recommendation for improvement, we are also happy to listen to them and consider them as appropriate."

Chen then moved on to its issue of compensation. He informed the employees that every May, Respondent reviews a compensation package and this year is no exception. He mentioned that Respondent has hired 30 employees since January 1, which "we believe is a promising sign for the future and hope you agree." Chen also reminded employees that last year, the management team did not get any salary increases, but the staff did receive salary adjustments. Chen then discussed wage scales at L.A., and informed employees that although they may have signed a card, they are not obligated to support the union. Chen concluded the meeting by stating as follows:

> so, remember we are committed to improving the quality of the communications between management and staff and making EGA a better place to work. To this end, we encourage all of you to feel free to express your views on how we can make this company a better place to work. I cannot promise you we will always agree, but I can promise you we will always listen. Thank you for your time. I hope you understand your company is here to stand behind you and protect our mutual interests.

Sometime in early July, Respondent invited its employees to lunch at the cafeteria. Employees were provided with free sandwiches and soda. The employees were addressed by Chen and Capt. Kuo. Kuo did most of the talking. He informed the employees that Respondent knew that it had made mistakes in the past, and that it would try to fix that. Kuo said that this was an open forum and he wanted to hear any suggestions that employees had to improve things at the company. He told the employees that he couldn't promise anything, but even though he was top management, he would bring any suggestions to people higher than him.

Marie Magbanua questioned Respondent's sick leave policy, and complained about having to give a reason when taking leave. She explained that when she calls in sick, she is asked to give a reason, and would be asked to come in half a day. Kuo replied that he would "speak to personnel about that, and maybe that will be changed." Another employee brought up September 11 and the fact that Respondent unlike other companies, didn't let employees go home. Another employee mentioned that when the Governor called a state of emergency for a snowstorm, Respondent was the only company that remained open. Another employee asked about the possibility of Respondent reimbursing employees for tuition, and another complained that Personnel could handle things better.

Chen responded that he did not realize that employees had all these complaints, and this is the first that he has heard about them. Chen added that he would "look into" the complaints and suggestions made by the employees.[87]

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[86] With respect to this item, Chen stated that some employees have asked for it, and it is being considered by the company.

[87] The above based on a compilation of the credible portions of the testimony of Maria

Continued

About a week before the election, one of Respondent's competitors, COSCO announced that some of its functions would be moved to mainland China or other countries. According to Chen, union organizers began to spread rumors that Respondent would do the same thing, by either moving functions away or even moving its headquarters. Additionally, as outlined below, the union had in its campaign literature consistently stated that Respondent would move or close after the election, and that such action could be forestalled if the employees voted for the Union.

Based on these facts, Respondent decided to issue written a "GUARANTEE" on July 16, the day before the election. This Guarantee was attached to a flyer which explained that whatever action COSCO is considering has nothing to do with Respondent. The flyer pointed out that Respondent had issued a firm commitment to stay in New Jersey which had been stated in a speech by Group Vice-Chairman, S. S. Lin on June 27, and is confirmed by the attached Guarantee signed by Thomas Chen. The Guarantee is a document which refers to a Guarantee by Respondent to its headquarters employees, "no relocation from Northern New Jersey, no loss of headquarters positions, no retaliation against any EGA employee." The document contains Thomas Chen's signature, and is dated July 16.

Chen also gave another speech to employees on July 16. Chen reiterated that Respondent would not relocate or move and quoted S. S. Lin's statement on June 27 to that effect. Chen also said that "during this campaign, our management has been made to realize that we are far from perfect. I hope you will give EGA a chance to do better in the future."

Chen also stated "If EGA does not make the effort to deal with our employees' concerns now, we are simply giving renewed opportunities for unions to come into our workplace."

Chen then talked about Respondent's policy of re-evaluating health care and other benefit programs the Respondent offers, and that it also offers career advancement and career opportunities.

Further on in the speech, Chen stated as follows:

> Again, I hope that you understand that the only real guarantee of your future is a healthy and well run company, not a corrupt union's empty promises. We need your help to accomplish that goal. I hope that you will give EGA one year to address your concerns. If you are not satisfied by the end of that period, you have the option to make this decision again.

Chen concluded the speech by saying, "Let's make the best of this situation by giving EGA a chance. Please vote 'No' to Local 1964 tomorrow."

Immediately after the election Chen gave a brief speech to employees. He thanked the employees for their support, and pledged to work with the employees to "address the issues you

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Magbanua, Millie Ha and Andrew Chien. Notably Kuo did not testify. While Chen did testify, he merely denied that he or Kuo asked employees what they wanted Respondent to change, and gave no further testimony about what was said at the meeting. I find this denial unconvincing and not credible, particularly since the testimony of the employees is consistent with statements made by supervisors at individual meetings with employees, as well as with Chen's own speech to employees where he asked for recommendations from employees for improvement.

helped bring to our attention." Chen also "encouraged each and every one of you to voice your individual concerns directly with your manager or if your are not comfortable to speak directly to personnel or to speak directly to me – my door will be open."

Chen also conducted a management meeting on July 31. He stated to the supervisors that the "staff has made a wise decision to give management the opportunity to improve. The company takes the opportunity seriously."

Chen added that it had set up an advisory committee to "review all the problems and issues that have been brought out by our employees." He further stated Respondent is reviewing 35 issues and concerns, and that it will roll out new policies and programs to improve working conditions not only in this office, but all of EGA."

Both before and after the union's campaign, many of the departments at Respondent's facilities conducted regular monthly department meetings, the primary purpose of which was for the supervisors to inform employees about developments at the monthly management meetings that were held. According to the credible testimony of several employees such as Maria Magbanua, Millie Ha and Michael Gunshefski, after the management meeting was discussed the supervisor would ask the employees if they had any work related questions or suggestions, such as how to do their job, or problems with vessels or customers.

However, the record also reveals, through a number of minutes of staff meetings prepared by supervisors, that at least in some departments at some of Respondents locations, employees would at such meetings, make suggestions or comments about working conditions and changes that they believed appropriate.[88]

It also appears that these reports of section meetings are circulated throughout the company, including being transmitted to personnel. The record reflects that at times supervisors from one of Respondent's facilities, would after reading of a suggestion made by another, comment favorably about and support that suggestion.

For example, on May 11, of 2000, John Gannon, apparently the supervisor in Respondent's Traffic Export Department in Chicago, reports that at his department meeting, employees requested that holidays be changed to allow Good Friday off, instead of Martin Luther King Day. The employees also suggested adjusting work hours from 8:30 am to 5:30 pm to 8:00 am to 5:00 pm. At another meeting of this same department on 5/8/01, Gannon again reports that employees made a request for Good Friday as a holiday, rather than Martin Luther King, since most of their customers were off on Good Friday. At another meeting held by this department on 2/5/01, the same suggestion was also made, but with alternative suggestions of an additional floating day.

On February 6, 2001 Diane Sauer, supervisor of Respondent's Documentation section in Baltimore, Md., reports that at a meeting of her section, employees supported the requests of the Chicago employees to change the holiday from Martin Luther King to Good Friday, since most steamship companies are off on Good Friday. The employees in Baltimore suggested an alternative of an option of taking either one of the days off.

[88] I note however, that these minutes do not reflect whether the manager asked employees if they had any suggestions for improvements or changes, or informed the employees that any suggestions made by employees would be transmitted to higher management.

On May 14, 2001 Mike Liu, from Human Resources (HR), responded to the requests made by these employees at these facilities. He pointed out that Martin Luther King is an important national holiday, and that many of Respondent's customers are open on Good Friday. He suggested that employees who want to take off on Good Friday use a floating day.

The issue of casual dress on a daily basis, was also mentioned at several meetings.[89] The request made by employees to permit casual dress all year at all times, was made at meetings of Baltimore Traffic on 9/15/00, and Chicago Traffic on 9/13/01 and 8/7/01.

On 9/26/00, John Hudgins of Respondent's Norfolk, Va. facility, reports that at section meetings in Norfolk, employees expressed agreement with employees at other facilities, that full time casual attire is desired. He notes that other companies in the area allow full time casual dress.

On 3/1/99 Louise Yu, supervisor of Respondent's Documentation section in New York, submitted a document entitled "some suggestions to the new building." The memo goes on to reflect, "I collect the following suggestions from Doc staff." The suggestions included "dress down everyday, since access to work area for visitors is very limited." Other suggestions made in Yu's memo included vending machines in the kitchen, waste basket in each stall in ladies room, voice mail, a place to rest or nap, and shortening the lunch hour and leaving at 5:00 pm everyday. That latter suggestion of reducing the lunch hour by 30 minutes and ending the day at 5:00 pm, was also made by Chicago Traffic Export on 9/30/00.

Further, it appears that at some point, Respondent changed the hours of work for its Los Angeles office to 8:00 am to 5:00 pm. This resulted in a number of employees at meetings requesting that their offices be allowed to have the same hours. They include Baltimore Traffic on 8/21/01, Baltimore Documentation on 8/22/01, and Chicago Traffic on 5/11/00.[90]

Mike Liu responded to these requests on 8/27/01, by stating that 8:30 am – 5:30 pm is most appropriate for Respondent's business, and noting that the L.A. office changed its hours because of the 3 hour time difference. Other than the memo from Louise Yu, described above, the record revealed no other evidence of suggestions made by or discussions with employees by managers, with regard to changes in working conditions in Respondent's New York – New Jersey offices, prior to the organizing campaign.

The record does reflect minutes of meetings conducted by Guy Siniscalchi on 8/23/02, where it was reported that employees suggested casual wear all year round, including sneakers, and a volleyball net, a meeting held by Fran Marrone on 8/27/02, where it was reported that the staff asked if business casual will continue all year round after Labor day, and another meeting held by Siniscalchi on 6/20/03, where employees questioned whether the required time to request vacation can be lowered from 4 hours to 1.[91]

Respondent has for sometime utilized a procedure of employee exit interviews. Employees who leave Respondent's employ are asked but not required to fill out an "exit interview report," which consists of twelve questions including their reasons for leaving, whether

[89] Respondent's policy had been to permit casual dress only on Fridays.

[90] Baltimore Documentation also suggested alternatives of flextime, i.e., half employees at 8:00 am – 5:00 pm and half at 8:30 am – 5:30 pm.

[91] Mike Liu responded to this request, by stating that the hour time limit is necessary, and suggests using floating time if employees need to take off within one hour.

they have another job, if so, what makes it more attractive than Respondent, what they liked least and best about working at Respondent, along with a chart ranging from excellent to poor, where the employee is asked to rate management in various areas, such as supervision, organization, attitude, flexibility, communication and providing recognition and appreciation.

The form also asks the employees the following questions:

> 1) Can you offer some suggestions as to how we can prevent or correct problems in:
>
> (a) attitude/behavior,
> (b) training,
> (c) co-worker problems,
> (d) system conflict,
> (e) communication,
> (f) other
>
> 2) What problems would you suggest need immediate attention?
>
> 3) Do you feel there is anything we can do to improve our company's overall staff retention.
>
> 4) Please add any comments or suggestions you believe may make the company a better place to work?

Examples of some of the suggestions provided by departing employees prior to any union organizing were: Cross-training, improve opportunities for promotion, sick leave to be rolled over and/or cashed out, "loosen dress code", flexible schedules, flexibility regarding punching in and punching out every day, sick leave to care for family members and job postings.

Thomas Chen reviews all of the exit interview reports, puts his stamp on them and testified that he considers them when he decides issues such as compensation and promotions for Respondent's employees.

Frank Spano, who is currently employed by Respondent as a manager in Human Resources previously was employed as Respondent's head of the Quality Control Division from 1997 until January of 2003. During his employment in that capacity, Spano from July of 2000 through October 2002, conducted quality control audits, which consisted in part of Spano interviewing employees of Respondent throughout North America.

During these interviews Spano would make sure that Respondent's management system was being properly implemented, and that employees are following work instructions, and meeting customers expectations. Another function of the audit is to ensure that employees expectations are being met. In that connection, Spano would talk to them about their work environment, and would entertain questions from employees about their job satisfaction, which included questions and comments by employees about compensation, job growth and promotions. Spano testified that he would report directly to Chen the results of his discussions with employees.

Where an employer who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course during an organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise that the combined program of inquiry and correction will make union representation unnecessary." *Reliance Electric Co.,*191 NLRB 44, 46 (1971) *enfd.* 457 F.2d 503 (6th Cir 1972); *Hospitality Services,* 330 NLRB 317 (1999); *Palm Gardens of North Miami,* 327 NLRB 1175 (1999); *Embassy Suites,* 309 NLRB 1313, 1316 (1992).

The essence of a solicitation of grievance violation is not the solicitation itself, but the inference that the employer will redress problems. *Doane Pet Care,* 342 NLRB #115 (2004); *Maple Grace Health Center,* 330 NLRB 775 (2000); *NLRB v. V&S Shuler Engineering,* 309 F.3d 362, 270-271 (6th Cir. 2002).

Further the fact that an "employer's representative does not make a commitment and specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. The inference that an employer is going to remedy the same when it solicits grievances in a pre-election setting is a rebuttable one." *Majestic Star Casino,* 335 NLRB 407 (2001); *Laboratory Corp. of America,* 333 NLRB 284 (2001); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F. 3d 399 (4th Cir. 1994).

In applying these principles to the above facts, Respondent argues that the evidence establishes that it had an established practice of soliciting and remedying grievances, which it may lawfully continue, notwithstanding the existence of the union's organizational campaign. *Mac Donald Machinery Co.,* 335 NLRB 314, 320 (2001); *Bell Halter, Inc.* 276 NLRB 1208, 1216 (1985); *Williams Litho Service,* 260 NLRB 773, 792, 793 (1982).

In that regard Respondent argues that it has established a past practice of soliciting and remedying grievances, based upon the evidence that at past employees department meetings Respondent solicited and received employees' opinions and ideas concerning working conditions, and that during quality control audits conducted by Spano, that practice continued, and that Respondent also solicited employee suggestions during employee exit interviews and questionnaires.

However, it is well settled that an employer cannot rely on past practice to justify solicitation of employee grievances, where the employer significantly alters its past manner and solicitations during the union campaign. *Bakersfield Memorial Hospital,* 315 NLRB 596, 600 (1994); *Clark Distribution Systems,* 336 NLRB 747, 748 (2001); *6 West Limited Corp.,* 330 NLRB 527, 528, 529 (2000); *House of Reaford Farms,* 308 NLRB 568, 569 (1993), *enfd. mem. 7* F.3d 223 (4th Cir. 1993); *Carbonneau Industries,* 228 NLRB 597, 598 – 600 (1977).

I conclude that the evidence presented demonstrates, consistent with the above precedent, that Respondent has significantly altered its prior practice of soliciting of grievances from employees, and that it cannot rely on such past practices to justify its conduct in soliciting grievances during the organizational period. As I have outlined above, the evidence discloses that at least at Respondent's New York - New Jersey location, the facility involved here, there was little or no evidence of solicitation of grievances at department meetings, as alleged by Respondent. Rather, I have credited testimony of employees that at department meetings, the supervisors would report on the developments at management meetings, and then entertain questions or suggestions concerning matters directly related to work matters such as how to do their job or problems with vessels. No evidence was presented that managers at department meetings asked employees for their suggestions or complaints about working conditions, as it did during the organizing campaign.

The record does disclose several minutes of department meetings in some of Respondent's other facilities, wherein employee complaints about working conditions, such as dress code, holidays, and working hours were expressed. There is only one document in the record involving the New York – New Jersey location, written by Louise Yu, supervisor of Documentation, which reveals that she "collected suggestions" from her staff, regard to the "new building." The suggestions included several ideas concerning working conditions, but the record is silent as to the circumstances of how Yu collected these suggestions. Thus it is not established whether Yu solicited these suggestions, nor whether she informed the employees that she would forward these suggestions to management. More importantly, since the memo refers to "suggestions" for the new building, it demonstrates that Yu's actions were related to the Respondent's apparent move to a new building at that time, rather than evidence of an ongoing process of soliciting employees grievances.

I also note that even in the case of the minutes of meetings at other facilities, which have limited evidentiary significance, in establishing past practice at the New York – New Jersey facility, the evidence does not disclose whether the supervisors involved either solicited the suggestion from employees, or informed the employees that their suggestions would be presented to management.

Respondent also relies on Spano's discussions with employees during quality control audits and Respondent's policy of exit interviews, where departing employees are asked for suggestions on how they felt Respondent could improve in numerous areas. However, I find this evidence far from sufficient to establish a prior practice of soliciting grievances from employees. Spano's audits were primarily concerned with work related matters and making sure that employees follow work instructions and meet customer expectations. While he would also entertain questions from employees about job satisfaction, including questions and comments from employees about compensation, job growth and promotion, this is far different than the comprehensive and the systematic conduct of Respondent described above, of solicitation of grievances.

The evidence of employees being asked to fill out exit interview questionnaires has even less significance. This practice involved only departing employees, and cannot be construed as remotely comparable to a practice of soliciting current employees about their suggestions and impliedly promising to consider or implement the changes in working conditions suggested by such current employees. Further, the filling out of questionnaires by department was voluntary, as contrasted with the evidence of the meetings and speeches by Respondent's officials which were mandatory. *House of Raeford, supra.*

Most importantly however, is the fact that during the union campaign, the solicitations for suggestions were made primarily by high level supervisors, such as Thomas Chen, Respondent's president, various Vice Presidents such as Jimmy Kuo, Charles Chen,[92] Raymond Lin, Anderson Kao, Dan Grogg, C. L. Chen, Y. Y. Lin and Charles Yeh, none of whom had ever, insofar as this record discloses, ever solicited employee suggestions prior to the organizing campaign. Additionally, some of the solicitations for suggestions was made by Capt. Kuo, who was from the Taiwan office of Evergreen Marine.[93]

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[92] Charles Chen, although he had worked as a manager in New Jersey, was at the time of his discussions with employees, employed by Respondent as a Vice President in its Salt Lake City office.

[93] The record reflects that Respondent is the Agent for Evergreen Marine, where Capt. Kuo is employed. While there is no contention of single employer status between the companies, it

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Therefore the fact that high level managers, and supervisors, including officials from other facilities and from Taiwan, were involved in the solicitations, contrary to prior practice is highly significant evidence that the current solicitations represented a substantial departure from Respondent's prior practice of soliciting grievances from employees. *Memc Electronics, supra,* ALJD, slip op. p. at p. 21. (CEO meeting with employees not consistent with past practice); *Clark Distribution, supra,* at 748. (Record does not show that higher level officials had a previous practice of soliciting grievances from employees); *6 West Limited, supra,* at 528 (prior practice did not involve senior management); *Palm Gardening, supra,* (Two high ranking officials who did not usually work at facility involved solicited grievances).

Finally, I note that no evidence was presented that Respondent had ever in the past situations where suggestions were made by employees, granted or implemented any of the employees requests. To the contrary, prior to the organizing campaign, the evidence discloses that Mike Liu, Respondent's Human Resources manager responded to and rejected several of the employees requests including changing work hours and exchanging Martin Luther King holiday for Good Friday. It was only after the Union appeared on the scene, that Respondent implanted several of the requests of employees, including year round casual dress, flexible hours, changes in lateness and sick pay policy and the very same exchange of holidays that it had previously rejected.

Based on the foregoing analysis and authorities, I conclude that Respondent's conduct in soliciting grievances during the organizational campaign represented a substantial and significant departure, from it's prior practice of soliciting grievances from employees,[94] and therefore that it is appropriate to draw the inference that the actions of Respondent in soliciting grievances from employees during the union's campaign, was implicitly promising to correct those inequities that it discovered as a result of its inquiries and urging employees that the combined program of inquiry and correction will make union representation unnecessary. *Reliance Electric, supra; Embassy Suites, supra.*

I therefore conclude that in the following incidents, described above, Respondent unlawfully solicited grievances from its employees in violation of Section 8(a)(1) of the Act. (1) Anderson Kao's discussions with Paolo Magbanua at lunch, and during a one on one conversation at the Morristown facility; (2) Dan Grogg and Guy Siniscalchi's conversations with employees at meetings; (3) C. L. Chen's comments at meeting of the Marine Department; (4) Kevin Huang's conversation with Chris Yu; (5) Sherry Yao's discussion with Raymond Lin; (6)

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is clear from the testimony of employees, that they perceive Evergreen Marine to be the parent company of Respondent. Indeed there is evidence to support that perception, such as the continuing practice of transferring employees from Evergreen Marine to Respondent. While I make no finding to the status of the two entities, I do conclude that since employees perceive a parent subsidiary relationship, the fact that Capt. Kuo would solicit grievances from employees takes on added significance, in addition to being unprecedented.

[94] The cases cited by Respondent, are not controlling and clearly distinguishable. In *MacDonald Machinery, supra,* the prior practice of soliciting grievances was by the same supervisor as the single alleged unlawful act of solicitations of grievances as after the union came on the scene. Further the supervisor had made changes in response to employee complaints prior to the union's appearance.

In *Williams Litho, supra,* once again the same supervisor involved had a prior practice of holding meetings with and discussing employee concerns. In *Bell Halters, supra,* the Administrative Law Judge, affirmed by the Board, found that Employer had engaged in similar surveys prior to the appearance of the union.

Y. T. Lin's conversation with Wayne Ting during lunch; (7) Capt. Kuo's discussion with Ting at the Morristown office; (8) Anderson Kao's and Jason Chang's conversation with Ting and two other employees at lunch; (9-11) Jimmy Kuo's one on one conversations with Sherry Yao, Claire Connor and Millie Ha; (12) Wendy Kao's discussions with Andy Chien; (13) Raymond Lin's conversation with Colton Huang; (14) E-mails sent out to employees by Jeff Tung and other supervisors on May 23; (15) Thomas Chen during his speech to employees on May 23; (16) Comments made by Cap. Kuo and Thomas Chen at a meeting in the cafeteria in early July; (17) Chen's speech to employees on July 16.

During each of these seventeen incidents, Respondent's supervisor's solicited grievances from its employees, by inquiring in one form or another about any suggestions, problems or questions that the employees may have about work or working conditions. In view of the fact that as I have found above, these incidents represented a substantial departure from Respondent's practice of soliciting grievances from its employees, this leads to a compelling inference that Respondent was implicitly promising to correct those inequities that it discovers as a result of its inquiries and likewise urging its employees that the combined program of inquiry and correction will make union representation unnecessary. *Palm Gardens, supra; Reliance Electric, supra.*

These incidents reveal that Respondent after soliciting the grievances from its employees made various remarks that tend to demonstrate implicit promises to remedy the grievances of its employees, such as asking employees to write down their suggestions, telling employees that the supervisor involved would transmit the requests to higher management, the company would improve, he would see if the company can change the points that the employees are not happy with and "then maybe you can change your mind," things are changing and there would be a lot of changes for the better, give the company another chance, and if employees are still not satisfied, employees can vote for the union next year, he would "speak to personnel about that, and maybe that will be changed," he would "look into" the complaints and suggestions made by employees, "I hope you will give EGA a chance to do better in the future," and "I hope you will give EGA a year to address your concerns. If you are not satisfied by the end of that period you have the option to make this decision again." *Federated Logistics and Operations,* 340 NLRB #36 ALJD slip op. p. 14-15 (2003). (Give the company a second chance, and "you wouldn't need a third party in order to take care of your needs."); *Doane Pet Care,* 342 NLRB #115 ALJD slip op. p. 8 (Issues raised by employees would be looked into); *Alamo Rent-A-Car,* 336 NLRB 1155, 1175 (Supervisor wrote down benefits suggested by employees) (2001); *Majestic Star Casino,* 335 NLRB 407, 408, (2001) (Employer would look into employees concerns); *Wake Electric Co.,* 338 NLRB 298, 306 (222), (Employees should give the company another chance); *Naomi Knitting Plant,* 328 NLRB 1279, 1280-1281, (1990) (Employer will get back to employee with answer); *Embassy Suites, supra* (Recommendations will be submitted to General Manager); *Palm Garden, supra.,* (Reference by Employer to "Third Party" implies promise of benefits); *6 West Limited, supra,* (Promise to look into matter); *Coronet Foods,* 305 NLRB 77, 85, (1991), (Supervisor wrote down employees suggestions, and said he would submit them to higher level supervisor); *Reliance Electric, supra,* (Employer will look into or review requests); *Carbonneau Industries, supra,* (Employer would see what he could do); *NLRB v. V&S Schuler Engineering*, 309 F.3d 362, 370-371 (6th Cir. 2002) (Employer asked "employees for time to deal with these problems and that they could have another vote on the union in the future if they wanted.")

Respondent contends that statements made by its officials requesting that employees give Respondent a second chance or other such similar comments are neither unlawful nor objectionable. *Noah's Bagels Inc.,* 324 NLRB 266 (1997); *National Micronetics Inc.,* 277 NLRB 993 (1985). However, Respondent's assertions are accurate to a point, but are not dispositive

of the issues with respect to this violation. These kinds of statements are not unlawful in themselves and do not constitute unlawful promises of benefit, because they are too vague to rise to the level of a promise of benefit and are within the limits of permissible campaign propaganda. *National Micronetics, supra; Allied EGCY Business Systems,* 169 NLRB 514, 517 (1968); *Noah's New York Bagels, supra.*

However, where as here, these kinds of comments, are accompanied by unprecedented solicitations of grievances by the Employer, they are reflective of an implicit promise to rectify or at least consider rectifying the grievances that the Employer has solicited from its employees. *Federated Logistics, supra; Wake Electric, supra; V & S Schuler, supra.* In fact, in *Noah's New York Bagels, supra;* cited by Respondent, the Board in addition to dismissing the 8(a)(1) violations of promise of benefits, based on "second chance" statements, affirmed the ALJ's finding violations of unlawful solicitation of grievances, with an implied promise to remedy same, based in part on the same company official asking an employee to give the Employer a second chance. *Id.* at 271.

As noted above, the compelling inference that a solicitation of grievance implicitly carries with it a promise to correct those inequities it discovers as a result of its inquiries, can be rebutted. *Capitol EMI, supra; Uarco Inc.,* 216 NLRB 1, 2-3 (1979). One of the ways that an Employer can rebut the presumption, is where it makes clear during its solicitation of grievances, that it cannot and is not making any promises. *Uarco, supra;* (Employer repeatedly told employees during the shop meetings involved that it could make no promises).

Respondent contends that it has rebutted the unlawful inference by statements made by Capt. Kuo at his meeting with employees in July that Respondent couldn't promise anything. Respondent also points to a flyer that it sent out during the campaign, wherein it stated "The law prohibits the company from making promises during the election period." This statement was made in connection with comments that the Union can promise anything, but the Union does not pay wages and their promises mean nothing. It then adds that only the company can deliver, and that it can only deliver what has been mutually agreed to during negotiations.

The record also reflects that in the course in Chen's May 23 speech, after asking employees for recommendations for improvements, and promising to listen to them and consider them as appropriate, and encouraging them to "feel free to express their views on how we can make this company a better place to work," stated "I cannot promise you we will always agree, but I can promise you we will always listen."

I conclude that these instances fall far short of meeting Respondent's burden of rebutting the inference of illegality that flows from Respondent's conduct. Initially, unlike *Uarco, supra,* Respondent here did not make repeated no promise statements, but did so only in two of the seventeen instances of unlawful solicitation of grievances discussed above. (Capt. Kuo's meeting, and Thomas Chen's letter) The third instance of a no promise statement was made in a flyer, in which no alleged unlawful solicitation of grievance was made or alleged. Further, I find the statement made in that flyer to be equivocal and uncertain, and does not state that Respondent wasn't or did not intend to make any promises. It merely commented that the law prohibits Respondent from making promises, and does not commit Respondent to following that requirement of the law.

More importantly, even where an Employer, unlike Respondent here, has made repeated statements of "no promises" to employees, these statements are insufficient to rebut the inference that it is impliedly promising to remedy grievances, where other comments made by the employer are not in accord with such denials. *Hospital Shared Services,* 330 NLRB 317,

fn. 6 (1991); *Majestic Star Casino, supra,* at 408; *Wake Electric, supra,* at 306; *Heartland Lansing Nursing,* 307 NLRB 152, 156 (1992); *Windsor Industries,* 265 NLRB 1009, 1016-1017 and cases cited therein.

The rationale for this conclusion, which is clearly applicable here, is aptly summarized by the Board in *Raley's Inc.,* 276 NLRB 971, 972 (1978), and quoted in *Windsor Industries, supra.*

In *Raley's,* at 972 the Board observed:

> Were we to conclude that Respondent, by merely reciting a "no promises" formula, had clearly discharged its duty to avoid giving the employees the impression that their complaints would be remedied, we would be forced to conclude that the parties at these meetings were engaged in a largely meaningless exchange concerning the employees' grievances and complaints. However, it is apparent that the reason for their voicing such complaints was the hope that they might be remedied. Clearly, as reflected in the Administrative Law Judge's Decision, the adamancy with which the employees continued to express their grievances and Respondent continued to entertain them, despite such formalized disavowals by Respondent that any changes would ensue, sufficiently indicates that such disavowals were not tendered or take at face value. Thus, we conclude that Respondent's oft-repeated stock phrase of "no promises" was a mere formality, serving only as an all-too-transparent gloss on what is otherwise a clearly implied promise of benefit.

Furthermore, I note that in U*arco, supra,* the Board in finding the inference of legality rebutted, emphasized the fact that there was no showing of animus towards the union and no evidence that the Employer's pre-election activities were conducted in the context of other unfair labor practices. Here, on the contrary, I have found above numerous instances of unlawful conduct by Respondent during the re-election campaign, including threats, interrogations and creating the impression of surveillance.

Accordingly, I conclude that Respondent has not rebutted the inference of illegality here, since the alleged no promises assertions were made along with statements negating such remarks, such as that it would look into and pass on to higher management the suggestions made by employees, and that he (Capt. Kuo) "would speak to personnel about that, and maybe that will be changed," and in Chen's speech, his comments that Respondent would be happy to listen to employees suggestions and consider them, and that "improve the work atmosphere, I have previously asked managers to consider what items are important to the staff," and then listed items under review. Further in Chen's July 16 speech, he expressly indicated that Respondent was making an effort deal with employees concerns now, rather than "giving opportunities for unions to come into our work place," and asked employees to give Respondent a year to address their concerns, and give it a chance to do better in the future.

These kinds of statements made by Respondent's officials negate the isolated "no promises" statements made by some of its officials. *Wake Electric, supra; Hospital Shared Services, supra; Majestic Star Casino's, supra; Windsor Industries, supra.*

Therefore, I conclude that Respondent has violated Section 8(a)(1) of the Act, in the seventeen instances described above, by soliciting grievances with the implication that it is

promising to remedy such grievances. In my view, the evidence overwhelmingly demonstrates that its employees "could reasonably infer that the Respondent was soliciting their complaints for the purpose of acting favorably on them in order to blunt the employees' enthusiasm for, or at least perceived need for the Union." *Alamo Rent A Car,* 336 NLRB 1155 (2001); see also, *Traction Wholesale Center v. NLRB,* 216 F. 3d 92, 102-103 (D.C. Cir. 2000) (Promises "designed to show that management alone had the werewithal to resolve employee problems.") [95]

The Fourth Amended complaint also alleges that Respondent through a number of named supervisors, promised its employees improved benefits if they refrained from engaging in union activities.

Terry Chang had a one-on-one conversation with Shirley Chiu in a meeting room at Respondent's facility. Change informed Chiu that the company would improve, it would be rather quick, and she would see it rather quick. Respondent asserts that this comment is too vague to constitute a promise of improved benefits. I disagree. It is not essential in order to find an unlawful promise of benefit, that employee benefits or grievances be identified precisely. *Dyn Corp.,* 343 NLRB No.124 slip op. 2 (2004); *Columbus Mills,* 303 NLRB 223, 230 (1991). Here although the union wasn't mentioned during this conversation, in the context of the numerous anti-union statements, some of them unlawful, as detailed above, I find that Chiu reasonably would have concluded, that Chang was suggesting that she not support the union, when he told her the company would improve, and she would see such improvements quickly.

I therefore find that Respondent violated Section 8(a)(1) of the Act by Chang's conduct. *Dyn Corp., supra;* (statement by employer that it "would be quite probable that changes would be made,") *Columbus Mills, supra; M. K. Morse,* 302 NLRB 924, 930 (1991) (Employer stated that he would be a fool not to address problems in the shop.) Chiu had a similar conversation with Jason Wu. Wu told her that the company would improve and would treat the employees better. For the same reasons and precedent cited above concerning Chang's comments, I conclude that Wu's remarks to Chiu are also an unlawful promise of benefit in violation of Section 8(a)(1) of the Act.

The complaint also alleged that Thomas Chen unlawfully promised benefits, in his speeches to employees. I have found above that Chen unlawfully solicited grievances in these speeches, and have relied in part in making such findings, on his statements "that concerns of employees can best be addressed directly without intermediaries," that he had asked managers to consider items important to the staff, that Respondent listen to and consider employees recommendations for improvement, if Respondent does not make the effort to deal with employees concerns they are giving opportunities for unions to come into the work place, and he hopes that employees will give employees one year to "address your concerns," and "let's make the best of this situation by giving EGA a chance."

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[95] I recognize that not all of the seventeen instances that I have detailed above, contained specific statements by supervisors tending to demonstrate illegality. However, all of these instances contained a solicitation of grievances by the supervisors, which gives rise to a inference of illegality which has not been rebutted. Further they must be considered in the context of Respondent's extensive and pervasive campaign of unlawful solicitation of grievances, which did contain statements that I have described above as indicating illegality, such as that suggestions will be looked into, or transmitted to higher management, or to give Respondent a chance. In that context, as well as in the context of other unfair labor practices found, I find all of these seventeen instances to be violative of Section 8(a)(1) of the Act.

As I have observed above, statements that request employees to give the employer another chance or a second chance are considered within the limits of campaign propaganda, and are not unlawful promises of benefit. *Noah's New York Bagel, supra; National Micronetics, supra.* However, here Chen went further than merely asking for a chance to show improvement. He specifically referred to suggestions made by employees to management, promised to address the employees concerns, without "intermediaries" i.e., the union. These kinds of statements, which link improvements in benefits with defeat of the Union are sufficient to conclude that a reasonable employee would understand the unlawful message that changes would occur more readily if the employees voted against the Union. *Dyn Corp., supra;* see also, *Reno Hilton,* 317 NLRB 1154,1155-56 (1995). I therefore conclude that Respondent unlawfully promised benefits by Chen's speech, in addition to unlawfully soliciting grievances in violation of Section 8(a)(1) of the Act.

David Chou, after informing Barbara Chi that Respondent knew that Chi was part of the union, told her that Respondent "knew about these things and will probably give you a promotion or a raise." This statement constitutes a clear promise of benefit in violation of Section 8(a)(1) of the Act. I so find.

Chi also testified to a conversation with Y. T. Lin, wherein Lin asked her not to join the union, and give the company an opportunity to correct what it knew was wrong. I find this remark to be similar to requests for a second chance found to be lawful campaign statements. *Noah's New York Bagels, supra; National Micronetics, supra,* and not violative of the Act.

The complaint also alleged that Respondent unlawfully promised benefits by the comments of Capt. Kuo in early July at lunch in the cafeteria. During the course of that meeting I have found, as detailed above that he unlawfully solicited grievances, with an implied promise to remedy the suggestions that he solicited. Among the items I relied upon in making that conclusion, was his response to a suggestion made Maria Magbanua that sick leave policy be changed with respect to the requirement that employees give a reason when it is requested. Kuo replied that he would "speak to personnel and maybe that will be changed." I find this statement of Capt. Kuo to be an implied promise of benefit, in violation of the act, which communicates to employees that enhancement of a specific benefit will be actively considered by Respondent. *Bakersfield Memorial Hospital,* 315 NLRB 596, 601 (1999); *Pennsy Supply,* 295 NLRB 329, 325 (1989).

Several witnesses furnished credible testimony concerning alleged promises of benefit by Raymond Lin. I have found above that Lin asked Colton Huang to support the company and he will be compensated for it, both in a conversation in Lin's office and again on the phone, on the evening before the election. These statements by Lin are clearly unlawful promises of benefit in violation of Section 8(a)(1) of the Act.

Shirley Chiu also met with Lin and asked her opinion toward the company. She replied that she was concerned about job security. Lin responded the company will improve to meet the employees requirements. I find this comment too vague to constitute a violation of the Act, particularly in context of the response. (Chiu had informed Lin that she was concerned about job security.)[96] Thus Lin's response can reasonably be construed as an implied promise to meet the employees requirements concerning job security, i.e. that it will not move or close, which as I discuss more fully below, I do not find to be unlawful.

[96] Lin told Chiu when she expressed concerns about job security, "don't worry."

The complaint also alleges that Respondent unlawfully promised benefits by conduct of Roseanne Panepinto. It is not entirely clear what evidence in the record General Counsel contends supports this allegation, but the record does establish that Panepinto told Millie Ha that Respondent would not move. I find nothing unlawful about that statement, since it is consistent with Respondent's position in its flyers, which was in turn responding to the Union's claim that Respondent would move or close, unless the employees vote for the union to protect them. I shall therefore recommend dismissal of this allegation in the complaint.

The complaint also alleges unlawful promises of benefit by Guy Siniscalchi. While I have found that Siniscalchi and Grogg, unlawfully solicited grievances by asking employees to write down suggestions for improvements in the company, and informing them that the suggestions would be passed on to management, I do not find these comments to be sufficient to establish an independent violation of an unlawful promise of benefit. I shall therefore recommend dismissal of this compliant allegation.

Kumad Patel was spoken to by Charles Yeh at Maher Terminal in June. Yeh informed Patel that even though the company is not doing well, Patel will be receiving a raise of $400.00 to make up for past years, where her raise was not as good. This remark was made in the context of Yeh informing Patel of other companies that had moved, although they had a union. It was also the first time that Patel had ever been informed of her raise by Yeh or any Vice President. I find that in these circumstances Yeh's remarks can reasonably be construed as an unlawful promise of benefit to discourage Patel from supporting the union. Respondent argues that there is nothing unlawful in Yeh's comments, since it is consistent with Respondent's position that the $400.00 raise was to make up for past years of lower raises, and consistent with Respondent's normal practice of granting wage increases on July 1. However, I note that Yeh informed Patel that the "company is not doing well," which is entirely inconsistent with Respondent's position with regard to the wage increase, which is as described more fully below, that Respondent was doing very well in 2002 when it decided to grant the $400.00 increase to all employees. Thus the message that I believe an employee would reasonably draw from Yeh's comments, was that the $400.00 raise was being granted to employees notwithstanding the fact that Respondent was not doing well, at least in part, because of the appearance of the union. I therefore find Yeh's statement to be another violation of Section 8(a)(1) of the Act.

Similarly, Anderson Kao told Paolo Magbanua during a luncheon meeting, that the company is in tough times now, but don't worry the employees are going to get a raise, and added that the company is changing for the better. Based on the same analysis, as Yeh's comment to Patel, I find Kao's statement also to be an unlawful promise of benefit.

A few weeks before the election, Jason Chuang, after asking Wayne Ting how he feels about what is going on at work, informed Ting that he had good potential to become a Deputy Manager in the Logistic department, and asked Ting to "think about that." I find that Chuang's statement to Ting constitutes an implied promise of a promotion to Ting, if he does not support the union, in violation of Section 8(a)(1) of the Act.

Sherry Yao was spoken to by Jimmy Kuo. He asked her for suggestions as to how the company could change, which I have found above to have constituted unlawful solicitation of grievances, in part since he asked Yao to give Respondent another chance and it will try to improve. Yao when asked about her complaints, replied that she had been employed by Respondent for a long time and had not been promoted. Kuo responded that it's difficult to judge why Yao hadn't been promoted, and surmised that Yao had not been lucky, I do not find an unlawful promise of benefit of a promotion or otherwise, based on Kuo's comments to Yao. Although he did ask her to give the company another chance to try to improve, these statements

are not in and of themselves unlawful promises of benefit. *Noah's Bagels of New York, supra; National Micronetics, supra.* While Yao did mention her dissatisfaction with Respondent's failure to promote her, I do not believe that Kuo's response can reasonably be construed as an implied promise to promote her or even to consider such an action. He merely commented that he could not judge why she had not been promoted, but gave no indication that Respondent would look favorably on her possible promotion in the future. I shall therefore not find a violation of promise of benefits based on Kuo's remarks to Yao.

Sherry Yao was also asked by Charles Chen to give the company another chance, and Andy Chien was asked by both Wendy Kao and Charles Chen to give the company another opportunity, or another chance. As found above, these comments are not unlawful promises of benefit. *Noah's Bagels of New York, supra.*

However, when Sherry Yao spoke with Mike Liu, after Liu asked her to give the company another chance, she complained about Respondent's grievance procedure. Liu replied that he will try "to change and improve the grievance procedure." This statement unlike the generalized give the company a chance remarks, represents a specific commitment to consider a making a change, requested by the employee, and is an unlawful promise of benefit in violation of Section 8(a)(1) of the Act. *Bakersfield Memorial, supra; Pennsy, supra.*

Finally the complaint alleges, and General Counsel contends that Respondent violated the Act by issuing a written and oral guarantee that it would not move, immediately prior to the election. General Counsel cites no authority in support of this allegation, nor does it make clear the basis of the assertion. It appears to construe the guarantee as an unlawful promise of benefit. General Counsel relies on testimony from numerous employees that job security was one of the primary reasons that employees supported the Union, and asserts, as testified to by Colton Huang, that once the guarantee was issued, the "contest was over." However, even if Huang's assertion is accurate, that does not mean that Respondent's statement is unlawful.

The evidence discloses that the Guarantee was issued by Respondent because the Union had made job security a prime issue in the campaign, by informing employees that it needed to vote for the union to protect the employees from Respondent moving or closing its facility. I find nothing unlawful about Respondent's conduct in these circumstances. *Langdale Forest Products,* 335 NLRB 602, 608 (2001) (Employer "No Cut Guarantee," in response to claims of union and not an unlawful promise of benefits.)

General Counsel argues that Respondent made moving the issue "when it began closing West Coast Clerical operations after the Los Angeles organizing drive." General Counsel further argues that "employees did not have to be rocket scientists to figure out that if it happened there, it could happen here, especially after documentation key-in functions was moved to South Carolina the year before the organizing drive began."

However, the record reveals no evidence that Respondent closed any of its facilities due to union organizing. While the record does establish that Respondent did close some of its facilities, no evidence was presented that these actions were motivated by anything other than legitimate reasons. Indeed this is no credible record evidence that there was any union organizing at any of the facilities that Respondent closed. While Respondent did move some functions to South Carolina, it insisted to employees that it had no intention of moving to Charleston or closing its New Jersey facility.

In fact, as outlined above, it was the Union, and not Respondent, who brought up the fact that Respondent had closed some facilities, and made the unsupported assertion that union

considerations were behind such actions, while arguing that employees needed to vote for the Union to ensure that Respondent does not move or chose its facility in New Jersey.

Thus, Respondent's "Guarantee" was a legitimate response to the Union's assertions, and cannot be construed as an unlawful promise of benefits. I therefore recommend dismissal of this complaint allegation.[97]

VIII THE ALLEGED GRANT OF BENEFITS

The complaint alleges that Respondent granted a number of benefits, both before and after the election, in violation of Section 8(a)(1) and (3) of the Act.

A. Lunches, Dinners and Picnics

A number of Respondent's employees including David Chiang, Maria Magbanua, Wayne Ting, Sherry Yao, Kerry Brogan, Millie Ha, Colton Huang, Clare Connor, Shirley Chiu, Jennifer Comia, Paolo Magbanua, Michael Gunshefski and Andrew Chien testified that during the organization campaign they attended lunches along with other employees in their departments and or dinners paid for by Respondent's supervisors at restaurants or at times in Respondent's cafeteria. These lunches and dinners, included a number of instances where the election campaign was discussed, and as detailed above, in some cases, I have found that Respondent committed various violations of Section 8(a)(1) of the Act by some statements made by its supervisors. It also appears from the testimony of the employees, that at some of the lunches or dinners, the union was not discussed at all.

According to nearly all the employees who testified, these lunches and dinners were unprecedented, and they were never taken out to lunch or dinner, by supervisors, prior to the appearance of the union. However employees Michael Gunshefski and Jennifer Comia did recall some instances of supervisors taking employees out to lunch prior to the union campaign. According to Comia, her supervisor Betty Ng would take out the entire department for lunch, once a year, to show her appreciation for the job that employees performed. Gunshefski admitted that prior to the union campaign approximately once every other month, his supervisors would take his department out to lunch, and once a year, food would be brought in for employees and paid for by management.

Several of Respondent's supervisors testified concerning taking out employees for meals. According to Siniscalchi, Jason Wu, Howard Tung and Eddie Lou, it was common practice both before and after the union campaign began, for supervisors to take employees out for meals, usually lunch, but at times dinner, where Respondent would pay. Respondent's supervisors each have an entertainment budget, out of which they pay for meals and or gifts for customers, at their own discretion. It is not essential to obtain prior approval from higher management to pay for meals for employees, and supervisors submit payment requests, with proof of payments made, in order to be reimbursed for the meals.

Wu testified that prior to 2002, he would take out employees for meals once a month or once every other month. These occasions, according to Wu, included taking out most or all of his department, which included 8 employees, and where he would request reimbursement. Wu

[97] To the extent that there are complaint allegations alleging section 8(a)(1) violations concerning some supervisors that I have not discussed, I find that General Counsel has adduced no evidence of such conduct, and recommend that such allegations be dismissed.

also testified that at times, he would take out one or two employees for lunch, and would pay, but not bother to put in for reimbursement. Wu testified that during the union campaign, he took his entire staff to lunch one or two times, during which the union or the election was not discussed.

Siniscalchi testified that both before and after the union campaign he would go out with the employees for lunch or dinner or drinks with the staff. According to Siniscalchi, at times he would pay and at other times, employees would pay. When he paid he normally would use his expense account for reimbursement. However, he asserts that at times, if it was just for a slice of pizza or a sandwich, he would pay, and not bother to put in for reimbursement. Siniscalchi further testified, that the frequency with which he took out employees for meals, did not change after the union campaign began.

General Counsel introduced records from account reimbursement requests for Siniscalchi, Wu and Jeff Tung for 2001 and 2002. Siniscalchi's requests indicate that between 3/26/01 and 3/15/02, he put in for reimbursement for meals and cocktails eight times. All of these occasions involved taking out customers or vendors, and none of them included employees. From 6/14/02 to 6/20/02 (pre election) Siniscalchi put in for three lunches, each with two unit employees. Additionally from 7/30/02 through 12/17/02, Siniscalchi submitted reimbursement requests for 7 lunches and one dinner with unit employees, including a department lunch on 11/15/02.

Jeff Tung's reimbursement requests, reveal that from 1/16/01 through 3/25/02, nine instances of lunch, dinners or gifts. Five of them involved only customers or vendors. One lunch, on 8/31/01 included three unit employees. Another instance on 11/27/01 included a representative from Brazil, but also included unit employee Steven Shen. On 3/2, and 3/8, Tung requested and received reimbursement for lunches, characterized as "seminal lunch for 4 staffs," without any evidence whether the 4 staffs were or weren't unit employees.

Starting 5/22/02, (after the union campaign began) Tung received reimbursement for 10 instances prior to the election. Eight of these lunches or dinners included unit employees, and two of them did not. From 7/18/02 through 12/23/02, Tung was reimbursed 14 times for lunches, dinners or breakfasts. Seven of these instances included unit employees, while the other six, included either only customers, vendors or other supervisors or non unit employees of Respondent.

Jason Wu's records reflect that between 5/4/01 and 2/8/02, he paid for lunches or gifts eight times, none of which involved unit employees. The records also included a lunch on 6/14 and 6/20 with the company listed as EGA SUP; and on the 6/20 incident, lists the guest as J.A. No record evidence establishes what EGA SUP signifies, nor who J. A. is or whether or not unit employees were present at either of these incidents.[98]

Respondent also invited all its employees to attend a dinner at the Westin Hotel in Morristown, N.J. in June of 2002, wherein S. S. Lin, Vice Group Chairmen spoke to the employees who attended.

[98] Since the 6/14/02 lunch cost $240, and Wu admitted taking out his department at least once during the union campaign, it appears that this 6/14/02 lunch did include at least some unit employees.

In the mid 1990's, the Group Chairman from Taiwan was in town, and addressed employees in the cafeteria. At that time, employees were provided Chinese, Japanese and American style food, without charge.

On another occasion, in celebration of Evergreen Marine's 25th Anniversary, a banquet was held in New York, where the group chairman spoke and food was provided to employees who attended.

In 1998, when Marcel Chang completed his term as president of Respondent, and returned to Taipei, a dinner was held in Respondent's cafeteria, where all employees were invited, and free food was served.

Additionally, from 1987 until Respondent relocated its headquarters from Jersey City to Morristown, Respondent maintained a cafeteria, where employees were offered a full lunch at Respondent's expense. Employees were provided with debit-type swipe cards to pay for the meals if they chose to take advantage of this benefit. At the end of the year, employees value of the meals received would be included in the wage portion of an employee's W-2, so employees were required to pay taxes on the value of the meals. Consequently some employees such as David Chiang chose not to take advantage of this benefit.

Respondent held a Fourth of July picnic, on July 3, 2002, in the courtyard in front of Respondent's building, between 11:30 am and 1:30 pm. Respondent served hamburgers, hot dogs, marinated chicken, vegetables, salads and cold drinks. This was the first year that Respondent held a picnic or any other party in celebration of July 4. There was no evidence that any discussions were held about the Union or the election during this July 4 picnic.

On 11/26/03 Respondent held a "Pre Thanksgiving Housewarming Luncheon." It was announced by E-mail on 11/24/03, and indicated that "management wanted to welcome all of us back to one *Ever Trust Plaza* and usher in the holidays in a fun and festive fashion."[99] Respondent announced that sandwiches, salads, fruits, deserts and soft drinks would be served, in the lunchrooms on the 4th, 6th, 10th and 16th floors.

In February of 2004, around Chinese New Years, several managers of Respondent sponsored a lunch by ordering Chinese take out food for employees, plus organizing a "lion dance" in costumes, and performed by employees and supervisors. This was the first time that such an event had occurred to celebrate Chinese New Years.

The record also reflects that during the course of the election campaign, the Union also provided numerous free lunches and dinners to employees and their families who attended various union functions.

The complaint alleges and General Counsel contends that all of these pre and post election dinners, lunches, picnics and celebrations, were motivated by Respondent's intent to discourage union activities in violation of Section 8(a)(1) and (3) of the Act.

However, it is well settled, that absent "special circumstances," it is a legitimate campaign device and not coercive for an employer to provide free food and drinks to employees. *E – Z Recycling,* 311 NLRB 950, 952 (2000); *Waste Management of Palm Beach,*

[99] Respondent had recently moved its offices from Morristown, back to Jersey City, where it owned the office building.

329 NLRB 198 (1999); *Chicago Tribune,* 328 NLRB 367, 368 (1999); *L. M. Berry & Co.,* 266 NLRB 47, 51 (1983); *Kut Mfg. Co. v. NLRB,* 890 F.2d 804, 810 (6th Cir 1987) ("Supplying food and soft drinks is common place in American elections and is not the equivalent of buying votes."); *Douglas Parking Co.,* 262 NLRB 267, 272 (1982); *The Zeller Corp.,* 115 NLRB 762, 765 (1956). I note that this conclusion follows, even though it is found that the free food and drink was in response to union organizing and was a departure from past practice. *E –Z Recycling, supra; Chicagoland Television News, supra.*

I therefore find it unnecessary to resolve the somewhat conflicting testimony, concerning Respondent's past practice with respect to providing free lunches and dinners to its employees. However, to the extent that such issues could be relevant to a determination of whether "special circumstances' are present, I conclude that Respondent did have a practice of its supervisors taking employees out to lunch or dinner, and that its supervisors had discretion to do so, and receive reimbursement from management upon presentation of receipts documenting such purchases by the supervisor. However, I also conclude primarily on undenied testimony of several employees, that prior to the union campaign, most of its supervisors rarely or never paid for employees lunches or dinners. I also find that such activities significantly increased after the appearance of the Union in the spring of 2002. I do note however, that prior to 1999, Respondent did provide free lunches to employees in its cafeteria, although it did require employees to pay taxes on the value of the meals.

I conclude that there are no "special circumstances" here that require a finding that the free food and drinks was coercive. General Counsel has not established that the value of the food and drinks supplied was excessive. Most importantly, attendance at all of these functions was voluntary. *Chicagoland Television News, supra; E – Z Recycling, supra; Douglas Parking, supra; Northern States Beef,* 226 NLRB 365, 376 (1976).

Accordingly, I conclude that these lunches, dinners and parties are not coercive and are not violative of the Act. I shall therefore recommend dismissal of the complaint allegations, dealing with the free lunches and dinners, the July 4th picnic, the Pre-Thanksgiving lunch and the Chinese New Year celebration.

B. The Alleged Liberalized Attendance Policy

Prior to the union campaign, Respondent was strict in enforcing lateness of employees, even considering an employee late if they arrived one minute after their start time. Three latenesses in a month would result in a tardiness notice.

On June 10, 2002 Respondent issued an E-mail notice, changing the lateness policy to allow employees who are late not more than 10 minutes to make up the time at the end of the day. In the same notice, Respondent announced a policy of modified flextime for employees. The new policy allowed employees a choice of schedule between 7:30 am to 6:30 pm,[100] as long as least 50% of the employees in each office are available during the "core" coverage period of 9:00 am to 5:00 pm.

The only testimony offered by Respondent in explanation of these changes was provided by Scott Chang Respondent's Human Resources Director, who testified on cross examination, that "we have working schedule earlier because we are doing a global business.

[100] The choices were 7:30 am to 4:30 pm, 8:00 am to 5:00 pm, 8:30 am to 5:30 pm, 9:00 am to 6:00 pm, and 9:30 am to 6:30 pm.

We have to deal with different time zones."

Neither Chang, nor any other witness of Respondent offered any testimony or evidence detailing who made the decision to make these changes, or when or why it was made.

I note that flexibility in lateness policy had been requested by employees at one of the meetings conducted by Siniscalchi as detailed above, where I found Respondent unlawfully solicited grievances. Further, flextime was included in Respondent's E-mail sent to employees on 5/23, that I also found to have been an unlawful solicitation of grievances. In response to that E-mail, employees responded that they were interested in having flexible hours. Moreover, the record also discloses that some employees included in the exit interview questionnaires, that asked for suggestions for improvements requests for flexible hours.

Furthermore, employees of Respondent had been requesting changes in work hours from as far back as 1999, particularly after Respondent changed its work hours for Los Angeles to 8:00 am to 5:00 pm. Mike Liu responded to these requests on behalf of Respondent on 8/27/01, by denying the requests and stating that 8:30 am to 5:30 pm is not appropriate for Respondent's business, and noting that LA's hours were changed because of the 3 hour time difference. Moreover, the record establishes that Maria Agosto a unit employee, had years before requested that Respondent permit 10 minutes of flexibility in lateness. Respondent rejected the request at that time.

Where an employer grants benefits to its employees during the critical period before an election, the Board infers that such conduct is unlawful or coercive. However, the Employer may rebut this inference by establishing an explanation other than the pending election for the bestowal of the benefit. *Desert Aggregates,* 340 NLRB #38 (2003) Slip op. p. 2-3; *Virginia Concrete Co.,* 339 NLRB 1182, 1184-85 (2003); *Star Inc.,* 337 NLRB 962 (2002); *Holly Farms,* 311 NLRB 273, 274 (1993) *enfd.*, 48 F.3d 1360 (Cir. 1995)

As a general rule, an employer's legal duty in deciding to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union was not on the scene. *United Airlines Service Co.,* 290 NLRB 954 (1988). In assessing the legality of a grant of benefits, the Board examines the size of the benefit conferred, the timing of the benefit and the number of employees receiving it and how employees would reasonably perceive the purpose of the benefit. *Star Inc., supra; B & D Plastics,* 302 NLRB 245 (1991).

Here Respondent granted to its employees in June, about a month before the election, two new benefits, a modified flextime policy, and a change in lateness policy, to allow employees to make up 10 minutes of time if they are late, at the end of the day.

Respondent has introduced absolutely no persuasive evidence to meet its burden of rebutting the illegality of these benefits. Respondent argues instead that General Counsel has not established that Respondent's attendance policy or flextime were key factors behind the employees' interest in the union, or that these issues were of great concern to employees. It further argues that the changes were based on business needs, with limited impact, since at least 50% of the staff must be available between the hours of 9:00 am to 5:00 pm.

Respondent further argues that changes in attendance policy and flextime were requested by employees, were under consideration before the union campaign, and were implemented on a company wide basis.

None of these arguments, either singularly or collectively, come close to meeting Respondent's burden of rebutting the inference of illegality that exists from the timing of these benefits. It has not introduced any evidence indicating that it would have granted these benefits if the union was not on the scene or an explanation other than the pendency of the election for the grant of the benefits.

In fact the evidence pointed to by Respondent that employees had been complaining about these matters prior to the union campaign and that Respondent had been considering granting these benefits since then is of no help to Respondent. In fact that evidence only serves to reinforce the finding of a violation. The employees had been complaining about these issues prior to the union campaign, but Respondent did not take any action to grant their requests, until after the Union appeared on the scene. Indeed, Respondent in 2001 rejected requests of employees to change work hours, by explaining that "8:30 am to 5:30 pm, is not appropriate for Respondent's business." It also rejected an employee's previous request for 10 minutes of flexibility with respect to lateness.

Yet in 2002, without any explanation, Respondent no longer insisted that 8:30 am to 5:30 pm is most appropriate for its business, and permitted a modified flextime schedule for its employees. Chang's explanation at trial, that Respondent made the change because Respondent does a global business and it has to deal with different time zones, is not persuasive. Even apart form the fact that Chang furnished no specific testimony as to who made the decision to grant these benefits or when or how the decision was made, his testimony makes no sense. Respondent was a global business in 2001 and was dealing with different time zones in 2001, and yet it refused to permit flexible hours. Indeed it explained to non L.A. employees, that the changes made for the L.A. office was effectuated because of the 3 hour time difference between L.A. and the East. However in June of 2002, less then a year later, Respondent suddenly is able to become more flexible in its working hours, by permitting modified flextime for employees. The only reasonable explanation for this change of heart by Respondent is the appearance of the Union and the pendency of the election. Further support for this conclusion is found in the evidence that flextime was specifically requested by an employee at one of the meetings where I have found Respondent unlawfully solicited grievances, and that Respondent's unlawful E-mail of May 23, soliciting employee comments, resulted in employees responding that they were interested in having flexible hours. Similarly, Respondents decision to permit 10 minutes of flexibility with regard to lateness, had been suggested by an employee at a meeting in response to Respondents unlawful solicitation of grievances, and Respondent had previously rejected a similar suggestion made by an employee prior to the organizing campaign.

Accordingly I conclude that Respondent by granting these benefits to discourage membership in the union and to influence the results of the election, has violated Section 8(a)(1) and (3) of the Act. *Carter's Inc.,* 339 NLRB 1087 fn.2 (2003); *Holly Farms, supra.*

C. Posting Job Opportunities

In the same June 11 E-mail, Respondent also announced a new policy of posting job vacancies for jobs up to the level of Manager on the Electronic Bulletin Board. Respondent has introduced no explanation why, how or when it decided to implement this change. Nor did it offer any explanation to establish that it would have made this change if the union was not on the scene, or indeed any evidence of an explanation other then the pending election for this benefit. Therefore pursuant to the precedent cited above, Respondent has failed to rebut the inference of illegality that exists from the timing of the grant of this benefit.

Instead, Respondent argues that this change was corporate wide, and was not the type of the size or type of benefit that would influence employees' vote. *Stanley Smith Security,* 270 NLRB 225 (1984); *Rust Craft,* 225 NLRB 327 (1976) (Substitution of time clock for manual notation record time not a substantial material change in working conditions.); *Litton Systems,* 300 NLRB 324, 331 (1999) *enfd.* 949 F.2d 249 (8th Cir. 1991) (Employer installment of central clock and buzzer to replace unsynchronized clocks did not alter terms and conditions of employment).

I disagree. In my view, a new policy of posting promotion opportunities unlike the changes in the above cases, represents a significant and material change in terms and conditions of employment. The new policy increases the employees' opportunities for promotion, since without such a posting, employees would not necessarily be aware of such openings. Indeed in Respondent's formal recommendations explaining and implementing various changes, dated August 13, prepared by the Human Resources Department, it states that job posting change was made to "create more prospects for career development within the company."

With respect to Respondent's assertion that the benefit was granted corporate wide, that fact is not sufficient in itself to rebut the inference that a benefit granted during the critical period is unlawfully motivated. *Sears Roebuck, supra* at 194 -196; *Holly Farms, supra.* I therefore conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by instituting a new policy of posting job vacancies. *Carter's, supra; Holly Farms, supra; Sears Roebuck, supra .*

D. Casual Dress

In September of 1997 Respondent amended its personnel policies to allow "casual business wear" as its dress standard on Friday's. Respondent previously required all employees to wear "appropriate business attire" during working time, which included a jacket and tie for male employees.[101] The new policy while permitting "business casual attire", on Friday's still required a neat appearance, and prohibited "inappropriate" attire, such as sneakers, sandals, shorts, cutoffs, tank tops, microminis and overalls, but allowed dress jeans, collared shirt or blouse and dress tennis shoes on Friday's.

In 1999 the policy was modified slightly, to add tennis shoes, jeans and sweat suits as unacceptable attire.

On July 19, 2002, Respondent notified its employees by e-mail that "business casual dress" will be permitted every day, for the summer, (until Labor Day), commencing on 7/22/05.

The record reveals further that at a meeting Respondent's Traffic Import Department on 8/27/02, employees asked if business casual attire will continue throughout the year. A similar question was asked at the 8/23/02 meeting of the Traffic Export Department, including a suggestion that casual wear include sneakers.

On 8/28/02, Scott Chang responded in an e-mail that Respondent was collecting information with regard to extending "business casual", and hoped for a quick decision. He added however that "we are of the opinion that sneakers should not be regarded as business casual."

[101] When announcing this new policy Respondent stated that henceforth on Friday's, employees "are invited to leave their suits and ties and dress suits at home."

In fact Respondent's management had requested that a survey be performed to find out what the policies are of Respondent's competitors with regard to casual dress. Jimmy Kuo sent an e-mail to Chang with the results of the survey, on 8/15/02, which reflected that of 12 of Respondent's competitors that were surveyed, eight of them allowed casual dress all year around, three permitted casual dress in the summer, and two of these allowed Friday casual at all times. One competitor permitted Friday casual, but also allowed jeans to be worn.

On August 13, 2002 Katy Li, of the Human Resources Department prepared a document entitled revising Respondent's Personnel policies, which reflects that the "President's Advisory Committee" met and recommended a number of changes to Respondent's policies. Included in this recommendation was the flextime change and job posting changes already implemented, and a change in dress code. The document states that more and more companies, including most shipping companies allow casual attire all year round, and this "promotes a mere comfortable and relaxed environment." Therefore the document states that business casual dress code will extend year round.[102]

No testimony was offered concerning the management advisory committee referred to in the document. However, at the management meeting of 7/31/02, Thomas Chen stated "on behalf of management. I would like to send our appreciation to all employees. We weathered a major storm. The staff had made a wise decision to give management the opportunity to improve. The Company takes this opportunity very seriously. We have already set up an advisory committee to review all problems and issues that have been brought to our attention by our employees. We have consolidated them into 7 or 8 categories to discuss the 35 issues and concerns. We are reviewing every one. We will roll out new policies and programs to improve the working conditions not only in this office but all of EGA."

No testimony was offered as to precisely who, how and when the actual decisions were made to change the dress code in July and again in August.

In any event the record does reflect that at a management meeting on August 29, 2002, Thomas Chen announced that the "casual dress policy has been extended beyond the summer. I believe all staff and management will enjoy this new privilege…Human Resources will issue an announcement about this issue." On August 27, an e-mail was issued announcing the change to casual dress all year round.

As I have detailed above, there has been suggestions made by employees for all year round casual dress since 1999, from Respondent's New Jersey facility, as well as from its offices in Norfolk, VA, Chicago, Ill and Baltimore, MD.

While this change in Respondent's working conditions occurred after the election, it was effectuated while objections were pending, and prior to a certification of results. Therefore the same standards apply in evaluating the lawfulness of the change, that are utilized in assessing pre election changes, including the inference that a grant of a benefit at that time raises an inference that it is coercive. *Virginia Concrete, supra* at 1184.

Therefore once again it is appropriate to draw an inference that the changes in dress code were coercive, an inference that Respondent can rebut by establishing that it would have

[102] Li did not testify so the record is unclear whether this document entitled "recommendation," reflects that a decision was made to allow casual dress all year round, or that it merely is a recommendation from the "Advisory Committee."

granted the benefit if the Union was not in the picture. *Great Atlantic & Pacific Tea Co.,* 166 NLRB 27, 29 fn.1 *enfd.* in part remanded in part 409 F.2d 296 (5th Cir. 1969); *United Airlines Service, supra.*

Once more I conclude that Respondent has fallen far short of meeting its burden in this regard. Respondent argues that the changes were made company wide, based primarily upon complaints made by employees outside the unit from other facilities, and were made after a survey of industry practices. None of this evidence meets Respondent's burden of proof that it would have made the changes if the union was not in the picture.

To the contrary, the evidence cited demonstrates the opposite conclusion, that it was the appearance of the Union that motivated Respondent's sudden concern for employees' suggestions, and its decision to effectuate these suggestions. As in the case of flextime discussed above, employees at a number of Respondent's facilities, including New Jersey had suggested full time casual dress since at least 1999, yet those suggestions, were totally ignored, until July of 2002, shortly after the election, when it formed an advisory committee to consider employee concerns and conducted a survey of how its competitors handled casual dress issues.

Chen's remarks at the 7/31/02 management meeting, make Respondent's conduct crystal clear. Thus Chen's reference to thanking the employees for "weathering a major storm," is an obvious reference to employees voting against the Union. His further statement that the staff made a decision to give management the opportunity to improve, which Respondent takes very seriously, is another clear reference to the numerous instances of Respondent unlawfully soliciting grievances from employees and impliedly promising to remedy their concerns. Chen was in effect telling his supervisors that Respondent intended to adhere to its pre election promises to consider and or remedy its employees concerns, to show them why they do not need a Union, and to reward them for accepting Respondent's request to give them a chance to improve.

Therefore, I find that the decision to change its dress code policy was in furtherance of Respondent's plans, as expressed by its president, which clearly demonstrates that its actions, including the formation of a management advisory committee were motivated by the appearance of the Union, and certainly would not have been formed, if there was no Union in the picture.

Accordingly, I conclude that Respondent, by changing its policy on casual dress has violated Section 8(a)(1) and (3) of the Act. *Carter's, supra; Holly Farms, supra.*

E. Improved Sick Leave Benefits

Respondent's policy as of 2002 with respect to sick leave was 12 days per year, which can only be used for illness by the employee, and no carryover if sick leave is unused. As of October 1, 2002 Respondent changed these provisions to allow employees to use half of their sick days if a family member is sick, and to permit employees to carryover any unused sick leave to the following year.

Once again no direct testimony was offered by Respondent establishing were, when and why the decision to implement these changes was made. However Chang did offer some testimony with respect to this issue. According to Chang, there had been complaints made from employees and managers about Respondent's failure to allow sick days to be used by family members. He asserts that since Respondent did not require doctor's notes, employees who

wanted to use sick days for family members illness would simply use their days for this purpose. However, Cheng contends that employees and supervisors were complaining that this policy was unfair, since it penalized honest employees who followed Respondent's policy and rewarded dishonest employees who would use sick days for family members without telling Respondent.

Furthermore Chang asserts that in 2001 California passed a law, requiring that Employer's in that state permit employees to use half their sick leave to care for family members. Chang further testified that he caused a survey to be conducted, in August of 2002 of Respondent's competitors, which revealed that most of them permitted family members to use sick leave, and to carryover unused sick days to the next year. Therefore, based on these factors, Chang asserts Respondent decided to implement these changes.

Respondent introduced into evidence the survey testified to by Chang, dated 8/7/02 of the number of benefits, including sick leave of Respondent's competitors. The document, interestingly is entitled NON-UNION EMPLOYEE BENEFITS, which suggests that the survey was taken only of non-union competitors of Respondent. With respect to sick leave benefits, the survey indicates that of eight competitors surveyed , four of them allow accrual to the next year, three do not, and one company provides no sick leave, but only a short term disability policy. Only one of the Employer's surveyed mentions that it permits sick days to be used for family care.

Furthermore, in the August 13, 2002 Recommendation prepared by Katy Li, which listed justifications for reversing Respondent's personnel policies, the subject of sick leave for accrual and sick leave for family members is discussed. With respect to accrual, the memo points out that under current policy, unused sick time is lost, and if employees have a serious illness, their short term disability benefits are insufficient to cover living expenses. However, if sick leave can be carried over, time can be accumulated for use in case an employee has a serious medical condition. The memo adds that after studying similar policies from other companies, a maximum of 60 days is reasonable.

The memo also states concerning sick leave for family members, that "California passed legislation three years ago permitting employees to use 50% of accumulated sick leave to take care of an ill child, parent or spouse. More and more companies have adopted this policy. When a family member is sick, employees have a difficult time concentrating on work. If they can use a portion of their paid sick time to take care of the family member (child, parent or spouse), both the company and the child will benefit."

The memo also reads referring to a total of eight changes, including flextime, casual dress, job posting, change in lateness, sick time accrual, sick leave for family members, cross training, and Martin Luther King vs. Good Friday holiday, that "the above changes have been determined to be the most demanded. Other programs and benefits will require additional assessment before they can be properly implemented to achieve the best results. It is suggested to agree to implement the proposed changes as part of the EGA work environment improvement plan."

Once more, as was the case with the previously discussed benefits, it is appropriate to draw an inference that these changes in sick leave policy were unlawfully motivated. *Virginia Concrete, supra.* Once again, I conclude that Respondent has fallen short of meeting its burden of proving that it would have changed these benefits if the Union was not on the scene.

Chang's purported explanations for these actions are clearly unpersuasive. Initially, I note the failure of Chang to testify as to precisely who made the decision to implement these changes, or when these decisions were made. Chen who presumably made or at least approved the decision, furnished no testimony in this regard.

Chang's assertion that the decisions was motivated by the change in California law is clearly pretextual. Contrary to Chang's testimony that the California law was passed in 2001, the recommendation prepared by Respondent's HR department stated that the California law was passed three years ago. In any event, whether the law was passed 3 years before 2002 or in 2001, (as testified to by Chang), Respondent took no action because of the law, until October of 2002. Respondent provided no explanation as to why, if it was attempting to comply with California law, it waited for several years after the law was passed to do so. The only reasonable explanation is obvious. The Union had by October of 2002 appeared on the scene, and a possible new election was pending. Chang's testimony about alleged complaints made by employees and managers about the fairness of Respondent's current policy have not been substantiated by any evidence, and was not specific as to when such complaints were received and from whom. Further, the recommendation by HR concerning such changes, makes no reference to such alleged complaints.

Moreover, Chang also testified that Respondent relied on a survey of Respondent's competitors that he caused to be conducted. Significantly the survey was conducted only of "non-union" competitors of Respondent. I find this fact to support the conclusion of discriminatory conduct, since if Respondent was truly interested in comparing its benefits to its competitors, it would not restrict the survey to non union competitors. Most importantly of all, the survey results did not support Chang's implicit testimony that Respondent was simply changing its policies to meet the benefits of its competitors. Only half of the companies surveyed, 4 out of 8, allowed sick leave to be carried over. Further, only one of the Employers surveyed permitted sick leave to be used for family care.

Finally, these benefit changes were recommended for approval in a memo from HR, along with other benefits that I have previously found to be unlawful above, and below, and were part of the Respondent's improvement program, which I have found to have been motivated by the appearance of the Union.

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by implementing these changes in sick leave policy. *Carter's, supra; Holly Farms, supra; Sears Roebuck, supra.*

F. The Change in Holidays

Respondent as of 3/1/02 provided its employees with nine full day holidays, two half days, and three floating holidays every year. The policy states that "company policy regarding paid holidays may vary from year to year." Included in the nine full day holidays was Martin Luther King Day. Good Friday was not included as either a full or half day holiday.

There had been suggestions made at meetings of employees at Respondent's Baltimore and Chicago locations in 2000 and 2001 that Respondent exchange Martin Luther King day as a holiday for Good Friday, or alternatively allow employees the opportunity to choose which of the days to take off. Reasons given for these requests were that most steamship companies do not have Martin Luther King day off, so employees have to "catch up" when they return to work after that holiday, more customers take off Good Friday than Martin Luther King day, and most staff would prefer to have Good Friday off and work on Martin Luther King day.

Mike Liu responded to these requests on 5/14/01. He stated that Respondent has decided that paid holidays are national holidays and Martin Luther King day "is one of the most important national holidays." Liu adds that Respondent realizes that Good Friday is an important religious holiday, but points out that in the East and West Coast area, lots of customers are open on Good Friday. Liu therefore suggests that the employees who think Good Friday is an important religious tradition, should use a floating day to meet their needs.

On August 13, 2002 as noted above, Katy Li wrote a recommendation regarding revising Respondent's Personnel policies. The document states as follows:

> Martin Luther King's Day vs. Good Friday – Martin Luther King's Day (in mid-January) is a federal holiday in the U.S., but most private companies are open on this day. EGA designates it as a company holiday for U.S. employees. Good Friday is considered as a religious holiday in many areas. Depending on the employee's individual situations, some may wish to have Martin Luther King's day off and others prefer to have Good Friday off. Because the total number of holidays is maintained at 10 and the workload on these days is not heavy, allowing employees the choice of either of those days off will not have a significant impact on the workload.
>
> The above changes have been determined to be the most demanded. Other programs and benefits will require additional assessment before they can be properly implemented to achieve the best results.
>
> It is suggested to agree to implement the proposed changes as part of the EGA work environment improvement plan.

Sometime in early October Respondent announced that starting in 2003, it would allow employees to choose either Martin Luther King day or Good Friday, except that at least ⅓ of the staff must be available on both days.

At a meeting of Respondent's Charleston Administration department on October 10, 2002, it was stated that "the staff is pleased with the new holiday added to the year, with either Good Friday or Martin Luther King day off."

On November 12, 2002 Respondent issued a circular detailing this change, and instructing employees that since ⅓ of the staff must be present on both days, to make their requests as to which day they wish to observe to their supervisor by 12/31/02.

Respondent's handbook was revised effective 1/1/03, to reflect this change as well.

Respondent adduced no testimony or other evidence, indicating who, when or why the decision was made to change this holiday, as detailed above.

Once again based on the above precedent, an inference is warranted that this change of benefits was coercive. Also once again, Respondent has fallen far short of meeting its burden of rebutting this inference.

In this regard Respondent argues that Respondent's policy states that its holiday policy may vary from year to year, that the issue had been raised at Respondent's offices other than Morristown, the number of holidays did not increase, and the benefit change was offered company wide. None of these contentions, either singly or collectively, comes close to establishing that Respondent would have changed this holiday "if the union was not on the scene."

Indeed, as was the case with the other benefits such as flexible hours and casual dress, the evidence of past complaints about these issues only serves to reinforce the conclusion that the change was motivated by an intent to discourage union activities. Employees, albeit at other offices had been complaining about this issue since 2000, and Respondent replied in May of 2001, denying the requests to either change the holiday or make it optional, by explaining that Martin Luther King day is a "very important national holiday," and many of its customers are open on Good Friday. Yet in October of 2002, Respondent changed its mind, listened to the suggestions of its employees, and allowed employees an option to choose between the two holidays. What had changed between May of 2001 and October of 2002 to justify this change of heart? Respondent does not say, and in fact, as noted provided no explanation for this change of heart. Certainly, there is no evidence presented that between May of 2001 and October of 2002, Respondent changed its view that Martin Luther King day "was one of the most important National Holidays," or that a lot of Respondent's customers are open on Good Friday, as expressed in Liu's response to its employees suggestions.

What has changed of course, is that the Union has now appeared on the scene, and Respondent was intent on demonstrating that it would show employees that they did not need a union to obtain better benefits. Indeed as Chen himself stated in his speech, "If EGA does not make the effort to deal with our employees concerns now, we are simply giving renewed opportunities for unions to come into our work place."

In my view, this change of holidays is just another example of Respondent addressing its employees concerns in order to discourage union support, both as a reward for voting against the union in this first election, and a reminder to them to do so again, in the event of a second election.

Therefore, I conclude that Respondent by changing[103] its holiday policy, has violated Section 8(a)(1) and (3) of the Act. *Carter's, supra; Holly Farms, supra.*

G. Voluntary Separation Program

In 1995 Respondent offered a voluntary separation or early retirement program, which provides for payment of severance pay plus continued medical coverage for employee and spouse for employees who choose to accept, and who are 55 or older. Respondent did not offer the plan in the years 1996 through 1999, and decides each year, based on financial concerns whether or not it will offer the program. In 2000, the program was offered once again. The program was announced on 9/29/00, and employees were required to submit applications

[103] Respondent's implicit contention that because it did not increase the number of holidays, it does not represent a change is without merit. It is clear that employees considered the issue a problem, and were urging either a substitution of one holiday for the other, or alternatively offering employees a choice. It is obvious that his change represented a material change in their terms and conditions of employment, notwithstanding the absence of an increase in the number of holidays.

to participate by 10/16/00. Payment is made in January of 2001. Eligibility for that year's program was 60 years of age and 15 years of service.

The program was not offered in 2001. On October 21, 2002, it was again offered, but initially the age requirement was still 60 years of age, with 15 years of service. Employees were notified that they must contact HRD by 1/1/02. According to Scott Chang, after this announcement, an employee with a heart problem approached HRD and asked to participate in the program although the employee was only 57 years old. Chang testified that he reported the request to senior management. Subsequently "senior management" reported to Chang that due to the health condition of that employee and that employee's long service, Respondent would allow that employee to participate. Furthermore it was also decided that the policy will be changed for everyone, and the eligibility age lowered to 57. Chang did not testify who in "senior management" informed him about this change, or why it decided that because one employee requested it, the eligibility requirement will be lowered for all employees throughout the country.

Thus on November 5, 2002, Respondent issued an announcement concerning the 2002 Voluntary Separation Program, lowering the eligibility to 57 and retaining the 15 years of service requirement. The new date for notifying HRD was November 15, 2002.

Once more, it is appropriate to draw an inference that this change in eligibility was coercive. Again, I conclude that Respondent has not met its burden of rebutting this inference. This issue is not as clear cut, in view of the history of Respondent having changed this benefit in prior years, and the absence of any evidence, unlike some of the other benefits discussed above, that Respondent had denied or ignored requests of employees to change these benefits prior to the union's appearance.

However, on balance I find that Respondent has not established that it would have changed the eligibility requirement, even if the Union was not on the scene. The evidence discloses, based on Chang's own testimony, that Respondent decides whether to offer the program, as well as the eligibility requirements based on financial and business considerations. Here the change was not based on any financial or business reasons, but solely based on the request of a single employee. Respondent presented no evidence that any prior changes in this plan were based in whole or in part on the suggestions or desires of any employees. In these circumstances, I conclude that Respondent has failed to meet its burden of rebutting the inference of illegality, and that this change is also violative of Section 8(a)(1) and (3) of the Act. *Carters, supra; Holly Farms, supra.*

H. The 2002 Holiday Party

Respondent in 2002 held a year end Holiday party at a catering facility during which it paid for food and drink for the employees who attended. The complaint does not allege, nor does General Counsel contend that the holding of this party is unlawful, particularly since Respondent gives such parties at all of its offices every year.

However, General Counsel does assert, as alleged in the complaint that Respondent violated Section 8(a)(1) and (3) of the Act by permitting employees to bring a spouse or a guest, and by furnishing a $400 gift card to all employees at that time, even those that did not attend the party.

There is no dispute that at the 2002 party, employees were allowed to bring a spouse or a guest, which is contrary to past practice, where only the employee was invited. It is also significant, that at one of the employee meetings, where I have found Respondent unlawfully

solicited grievances, one of the suggestions made by an employee was to permit spouses to attend the yearly Christmas party.

With respect to the $400 gift card, each employee received a $400 gift card, which is redeemable at various stores that employees could select. All employees in all of the Respondent's offices received this gift, even those who did not attend the party.[104]

At the party, Thomas Chen announced to employees that "we are happy to announce that we have been having a good year, so we're going to give out gift certificates to a number of stores."

In prior years, Respondent furnished various kinds of gifts at Holiday parties, but they were not given to all employees. Respondent would conduct raffles, and prizes would be awarded only to employees, who were successful in the raffle drawing. The value of items awarded in these drawings ranged from $25 to $200, and included gift certificates and electronics. No prizes were awarded to any employee who did not attend the party.[105]

Spano testified, corroborated in part by Gunshefski, that in 1993, Respondent awarded a free airline ticket on EVA Airlines to any employee who was employed for at least one year by Respondent. EVA Airlines is a company, which flies in Asia, and is a public company, which was founded by the Chang family, the primary shareholder of Respondent.

In the early 1990's Respondent gave out bonuses at the end of the year to all employees, ranging from 4-6 weeks salary. This practice ended in 1996. In 1997 Respondent substituted a money purchase plan for the year end bonuses, wherein it contributed 10% of each employee's salary into a money purchase plan at year end. This benefit was in addition to Respondent's previously established 401(K) plan.

Here, as with the other benefits granted by Respondent detailed above, it is appropriate to draw an inference of unlawful motivation, since they were granted while objections were pending. *Virginia Concrete, supra; WISPAC Foods,* 319 NLRB 933, 939 (1995).

The burden once more shifts to Respondent to rebut that inference by demonstrating that it would have granted these benefits even if the Union was not on the scene. In that regard, Respondent argues essentially that it has met that burden by establishing that these benefits were entirely consistent with Respondent's past practice. Respondent notes that Respondent distributes gifts every year at its holiday parties, ranging from $25 gift certificates to airline tickets and electronic equipment. Respondent also relies on the fact that it had a long practice of granting bonuses to employees.

However, I conclude that the benefits granted in 2002 were significantly different than in prior years, and are therefore violative of the Act. In my view the $400 gift certificates exceeds significantly the value of prior holiday gifts, and should be treated as akin to a bonus.

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[104] This included Respondent's Los Angeles office, which is as noted under contract with a union. The union in Los Angeles filed no grievances or ULP charge concerning the distribution of the gift card to the LA employees.

[105] The above findings based on a compilation of the credible portions of the testimony of Chiang, Maria Magbanua and Gunshefski. To the extent that Spano's testimony suggests that all employees received a prize each year, and or that the value of the prizes was approximately the same each year, I do not credit that testimony.

Respondent's reliance on the testimony concerning airline tickets is misplaced. The evidence reveals that this was a one time benefit granted only in 1993, and on a airline affiliated with Respondent that flies only in Asia.

The evidence also discloses that in prior years, gifts were given to employees, but only to employees who were present at the party, and who were successful in the raffle. In 2002 in contrast, all employees receive a $400 certificate, even those who did not attend the party.

Respondent's reliance on its past practice of granting bonuses is also unconvincing. These bonuses were granted only until 1996, and then were replaced by a money purchase plan, which is still continuing, and which was also continued in 2002. Therefore, these bonuses have no bearing on evaluating the $400 gift certificates.

I find therefore that this benefit is substantially different from prior years. *DMI Distribution of Delaware,* 334 NLRB 409, 410 (2001) (Cash bonuses of $100); *Vestal Nursing Center,* 328 NLRB 87, 93 (1999) (Increased bonuses from $25 to $50, and $25 to $100); *Dubak Corp.,* 307 NLRB 1138, 1160 (1992) ($500 bonus much larger than bonus granted in prior years); *D. V. Company & Printing Co.,* 240 NLRB1226, 1285 (1979) (Substituting bonus of $100 for prior practice of distributing liquor or perfume to employees).

Since Respondent has offered no explanation or business justification[106] for its decision to grant the $400 gift cards to all employees, I conclude that Respondent has not shown that it would have done so if the Union was not on the scene, and has therefore violated Section 8(a)(1) and (3) of the Act. *Carters, supra; Holly Farms, supra.*

Similarly, Respondent also allowed employees to bring a guest to the party, for the first time. Once again, no explanation was given as to why Respondent changed its policy in this respect. I note that this suggestion had been made by one of the employees at one of the meetings wherein I have found that Respondent unlawfully solicited grievances from its employees. This fact further reinforces the inference of illegality that flows from the timing of the grant of this benefit, while objections were pending. *Yoshi's Restaurant,* 330 NLRB 1339, 1345 (2001).

Since Respondent has adduced absolutely no evidence tending to establish any reason other than the election for the granting of this benefit, it has failed to rebut the inference that the benefit was granted for unlawful reasons. I therefore find that once again, Respondent has violated Section 8 (a)(1) and (3) of the Act. *Carter's, supra; Yoshi's Restaurant, supra.*

I. The Wage Increases

On July 15, 2002. two days before the election, Respondent's 114 bargaining unit employees received their pay checks, which included across the board raises of $400 per month for all bargaining unit employees. This was the first year that employees had received solely across the board increases. Prior increases had been given to employees, based primarily upon a "merit" system, wherein evaluations given by supervisors that reveal a

[106] While I note that Chen when announcing the issuance of gift certificates, mentioned that business was good as a reason for the decision, Chen who testified extensively in this proceeding on other matters, furnished no testimony on this issue. Nor did any other witness of Respondent testify as to why it decided to issue $400 gift cards to all employees, even those who were not in attendance.

numerical score for each employee, is utilized by upper management to decide upon increases for employees. Based upon this system, depending upon the score received by employees, at times employees would not receive any raise at all.

In 2001, employees did not receive any raises in July. However, in October of 2001, the employees did receive raises ranging from $0 to $425.00. However, only one employee received $425.00, while eighteen employees received no increase. Most of the increases ranged from $75.00 to $175.00 per month.[107]

In the year 2000, raises were distributed on July 1. Respondent employed 84 employees in the proposed unit at that time. The raises granted ranged from $0 (to two employees) to $200.00 per month (to six employees.) Forty seven employees received raises of $175.00, sixteen received $150.00, four received $100.00, one received $125.00, one received $185.00, while seven employees received between $22.00 and $27.00 per month.

In the year 1999, no bargaining unit employees received any raises at all. Thus in sum, as General Counsel points out in its brief, 93% of Respondent's unit employees received a bigger salary increase in 2002 than they had in the three previous years combined.

The record reflects that during the course of the organizational campaign, several employees were spoken to by various supervisors of Respondent, wherein the subject of raises and or Respondent's business was mentioned.

Wayne Ting worked in the Intermodal section of Respondent's Logistics department during the organizing campaign. Ting testified that in 2002, he was not expecting such a large raise, because he was informed by his supervisors to conserve and cut down on costs. Sometime after March of 2002, Jason Chuang, Ting's supervisor at monthly meetings would tell the employees present, including Ting that "times are hard", and urged them to be cost conscious. Ting also attended sectional meetings held between January and July of 2002, where Vice-Presidents Charlie Yeh and Y. T. Lin spoke. Both Yeh and Lin during this time informed employees that "business is not as good," and that the Logistics department spends money. Therefore it is important to be careful, avoid mistakes and cut costs.

Ting also testified that he saw an article on Respondent's Electronic Bulletin Board (EBB) written by the Journal of Commerce, dated April 29, 2002. This article reflects that Respondent had sent letters to various truckers telling its haulers that "times are tough in shipping, and that the ocean carriers was reducing its payments to them by 5% effective April 15." The article goes on to say that other companies have received similar letters, stating the need for rate cuts, and includes a quote from a trucking company; "every shipping company, because of current low freight levels has nothing left to pay its bills so they're cutting all they can."

David Chiang also testified that he was not expecting a $400 increase, because he did not receive such a large increase before, other than in 1996 or 1997, which he believed was around the time that the Los Angeles organizing took place. Further Chiang attended a monthly meeting in December of 2001, where Charlie Yeh and Capt. Lin told employees that because of the recession, Respondent is facing "a hard time," and that employees have to work hard to

[107] 37 unit employees received raises of $75.00 per month, five received $100.00, sixteen received $175.00. Further, five employees received $225.00, two received $275.00 and one employee received $150.00 and another received $325.00.

save costs, especially since operations spends money and does not make money, like the business departments.

David Yang was told in 2002, by Thomas Chen, C. L. Chen and Y. T. Lin that Respondent's freight charge is not good and their ships are not fully loaded, and business was not good. Yang further testified that Thomas Chen would make similar comments at the beginning of each year, during an annual report to employees, including in January of 2002.

Maria Magbanua recalls being told at department meetings in April by Dan Grogg that the company is not doing well, and that some contract rates were lower in 2002, as compared to the prior year.

Dan Grogg also informed Michael Gunshefski during a one on one conversation, in early 2002, that the company wasn't doing that good, and this year looked like it was going to get worse. Siniscalchi told employees essentially the same thing as Grogg at a department meeting early in 2002.[108]

Andy Chien credibly testified that in January of 2002, Frank Marrone came out of a manager's meeting, and reported to Chien's department that business is tough, and employees might receive a $25.00 or $50.00 per month increase.

Jennifer Comia was informed at monthly meetings by her supervisor, Betty Ng in late 2001 and early 2002, that Respondent "was not doing well."

Kerry Brogan had a conversation with Raymond Lin, sometime prior to the election. Lin told her that since 9/11 things were not that good, and there were a lot of companies not doing too well, and the economy was depressed.

I have found above that during a lunch with Paolo Magbanua, sometime between April 15 and the election, Respondent by Anderson Kao and Jason Chuang unlawfully solicited grievances from employees. During that lunch, Kao also informed Magbanua that the company is in tough times now, but don't worry the employees are going to get a raise.

I also found above that Chuck Yeh in early July unlawfully promised benefits to Kumad Patel by informing her that even though the Company is not doing well, Patel will be getting a raise of $400.00 a month to make up for past years when the raise was not as good.

I also found above that Respondent unlawfully solicited grievances and unlawfully promised benefits during Raymond Lin's conversations with Colton Huang, wherein Lin asked Huang about his complaints about the company, Huang asked about getting a raise, and Lin replied that Huang should support the company and he will "compensate" Huang for it.

Similarly, I found that David Chou unlawfully promised benefits, when he told Barbara Chi that Respondent knew that Chi was part of the union and Respondent would probably give

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[108] The above findings based on the credited testimony of Magbanua and Gunshefski. As noted above, I credited Maria Magbanua over the denials of Grogg and Siniscalchi as to her testimony concerning other statements made at meetings, and I credit her here as well. I credit Gunshefski, since his testimony is similar to the credited testimony of Magbanua, as well as other employees discussed above and below, reflecting in various ways that Respondent's business was not good in 2002.

her a promotion or a raise.

Respondent unlike the minimal evidence that it presented concerning its decisions to grant the various benefits that I have found above to be unlawful, adduced substantial testimony and documentary evidence, explaining its decisions to grant wage increases over the years, particularly in July of 2002.

It produced three witnesses, Jay Buckley who testified about Respondent's business in general, as well as its trends in 2001 and 2002, Scott Chang who testified concerning the process utilized by Respondent in deciding upon the increases, and Thomas Chen who made the decision, testified to his reasons for doing so.

The testimony of these witnesses establishes that Respondent is a general agent in North America for ocean steamship companies. Its primary Principal is as noted Evergreen Marine (EMC), based in Taiwan. However, in late 2001 and early 2002, two new companies Hatsu Marine Ltd. (Hatsu) and Lloyd Trestino Navigazione SPA (LT) were formed. Hatsu is based in the United Kingdom and LT in Italy. Respondent, as general agent for its Principals, generates sales, provides customer service, documentation, arranges for shipside operations and coordinates inland distribution of cargo in North America.

The primary source of revenue for Respondent is commissions paid to it by the Principals, which is in turn based on revenue generated from the transport of cargo and containers shipped to and from North America by the Principals. Respondent received commissions equal to 3.5% of freight paid on inbound containers, and 7% on outbound containers.

Respondent also generates some of its revenue through its ownership of commercial real estate in Jersey City, New Jersey, including the building where its headquarters are currently located, and from its provision of transportation related services, including the rental of chassis and other equipment used in the movement of shipping containers to and from the Principals' vessels.

Thomas Chen became President of Respondent in October of 2000. He had previously had thirty years of experience in the industry, beginning his career in 1974 as a Sales Representative for EMC in Taipei. He worked his way up and served in several capacities for both EMC and Respondent at various locations, until he was appointed to the position of head of Respondent's Los Angeles office in 1997. By the time Chen assumed that position, Local 63 of the I.L.A. had already been certified as the collective bargaining representative of Respondent's clerical employees, and the initial contract had already been signed.[109] Chen did participate in negotiations with Local 63 for a renewal agreement and was involved in the implementation of the agreement with the Union, including the disposition of some grievances.[110]

Scott Chang, who has been in charge of Respondent's Human Resources Department, since August of 1999, first became involved in salary reviews in 2000. He testified that since at least 1998, Respondent annually evaluates compensation in the spring, and makes wage

[109] The Union was certified in L. A. on November 27, 1996. The contract was signed on March 26, 1997 and ran from February 23, 1997 through June 30, 1998.

[110] According to Chen the Union in L.A. would file on the average of 2-3 grievances per month. None of these grievances were taken to arbitration by the Union.

increases effective July 1 of each year. The first such raise that Chang became involved with was the raises granted in July of 2000. In the spring of that year he became involved in the process. It starts in May, with various management meetings, where the issue is discussed. Chang submits data to the Chairman and President, and a decision is reached. Chang then prepares a document which represents a justification for the increases and which is signed off on and approved by the President and Chairmen. The document for the year 2000 was dated June 14, 2000, and was approved by the Chairmen and President on the same date. The document reflects that in 1998 the average wage increase for all of Respondent's employees throughout North America was 9.03%,[111] that the United States government General Schedule (G.S.) raise was 2.30% and the CPI was 1.60%. This document also reflects that in 1999, the employees received no raise at all. According to Cheng this was because business was not good, and Respondent had incurred costs due to a restructuring of its offices.[112] The document also reflects that the average private sector salary increases in 1999 was 6.75%, [113] General Schedule increase was 3.10%, and the CPI 2.20%. The figures listed for the year 2000 were 4.46% average increase for Respondent's employees, 6.40% increase for the private sector, 3.80% for General Schedule United States Government employees, and no listing for the amount of the CPI increase.

Further, the document reflects the following as a justification for the raises decided upon of an average of 4.46% for all of Respondent's full time employees, except for the employees at Los Angeles, which as noted above, were covered by a union contract.

> [sic] EGA 2002.07.01 Salary adjustment suggestion in details as follows:
>
> 2.1 Background:
>
> In the end of 20th century, US economy has been booming for the longest period of time in US History, Jobless rate the beginning of year 2000 reach the lowest point of 3.9% (many large metropolitan area even lower to 3%), employment market is so good that even to the embarrassment situation that Employer can not find the employee.

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[111] No further breakdown of this average wage increase was provided. However, David Chiang recalled that he received an increase of $360.00 per month on 7/1/98, Michael Gunshefski recalled an increase of $400.00, and Wayne Ting, $310.00 per month, which amounted to 9.13% of his salary. Ting also admitted that in five of the nine years that he was employed at Respondent he received raises of over 9% of his salary. His $400.00 raise in 2002, represented a raise of 9.73% of his salary.

[112] Respondent sent an E-mail to its supervisors and managers dated 6/30/99, informing them that "due to continued market pressures combined with escalating operational costs, EGA NFC Mgt must advise that salary adjustments and promotions normally scheduled for July 1st will be postponed. Mgt promises to regularly review the Company's compensation plan to ensure that we remain competitive within the industry and will pursue salary adjustments when the business environment allows." The E-mail goes on to instruct the supervisors to announce to their staff the decision.

[113] Chang obtained that information from an annual survey conducted by Logistics Management & Distributors Co., an online company that surveys various transportation companies, including shipping companies. A copy of the report from Logistics Management is included in the report proposed by Chang, along with the G.S. schedule.

> However, since 1998.07.01, EGA (Except EGA LAX OCU member) has not make [sic] salary adjustment for two years, meanwhile, other private sector salary increase about 6.4% (1999 was 6.75%, 2000 is 6.4%). Since 1999.07.01, EGA has 116 employee resigned (not including 15 personnel lay-off due to company restructure). EGA's turnover rate reach 20%, which is higher than average market rate (12%). In order to retain employee, reasonable salary adjustment is a must.
>
> Thought 1998, 1999 EGA's internal restructure, year 2000 total salary saved $3 million, EGA's employees has reduced from 607 employee of Nov/1998 to 540 employees of May/2000. In same period, Evergreen Group's vessels in increasing, Cargo lifting is increasing, so employee's workload is increasing. In light, of job market is so hot, to retain experienced employee, and their expectation, suggest increase salary at rate of 4.46%.
>
> 2.2 Affected personnel:
>
> EGA full-time employee by 2000.06.30 (exclusive LAX OCU employee), not including EGA's 6 top Management, total 458 personnel.

The wage increase for 7/1/00 was divided into two components. Part of it was a cost of living increase which was across the board to all employees, but differed depending upon the city of employment. Employees in "high" cost cities such as New York, Boston, Chicago, San Francisco and Tacoma, received increases of $100 per month, while employees at Respondent's other 16 locations, referred to as Areas Band C received increases of $75.00. The remainder of the increase designated as the performance component, was based upon the employees evaluation score, ranging from 1-5. Employees who scored a 0 received no performance increase, while employees who received a 5, received performance related increases of $125.00. At the instant New York location, of the 84 employees in the proposed unit, the raises given ranged from zero to $225,00 per month. In that group all employees received the $100.00 CPI, increase except for two employees who had been hired shortly before the increases were to be effective. Three employees received no performance related increases, since they scored 1 in their evaluations. Five employees, who received a five on their evaluations, received the maximum increase of $125.00, plus the $100.00 CPI. The largest majority of employees (53 employees) received performance increase of $75.00, plus the $100 CPI increase, based on their evaluation scores of three. The remaining employees who received scores of 2 (14 employees) and 4 (3 employees) received performance increases of $50.00 and $100.00 respectively.

Chang testified further that he included comparative data on salaries in the industry, because Respondent needed to remain competitive, and its turnover rate was high. Chang added however that Respondent's business in the spring of 2000 was "sort of like that, it wasn't good."

In May of 2001. Chang approached Chen and initiated a discussion of raises for July 1, 2001. Chang stated that the turnover rate for Respondent's employees was high, and that Respondent's competitors were paying higher salaries than Respondent. Chen also mentioned that in 1999, Respondent provided no raise, and a raise of less then 5% in 2000. Chang added that in the industry, these past 3 years (including 2001) together had given increases totaling

17%, and Respondent was losing employees, in part because of this gap. Therefore, Chang recommended that Respondent attempt to close the gap and reduce the turnover problem by giving an increase in July 2001, as it normally does.

However, Chen after a discussion with Wu, decided that business was not good, liftings were down, and they were unsure about Respondent's future prospects. Chen therefore decided to postpone the raise scheduled for July 1, 2001. Chen testified that every week, he receives reports at weekly meetings from Jimmy Kuo, and listens to reports from Kuo and the business department concerning business conditions. These reports include statements concerning lifting's, income expenses, and gross profit. According to Chen his review of these reports showed that Respondent's lifting's were down and its gross profit was going down during this period of time.[114]

Sometime in August, management met again. Chang mentioned that Respondent had to do something, too many people are leaving. He brought up the Salt Lake City office, where 12 people resigned, and went to work for competitors for 20-30% higher salaries, as well as other offices, including Morristown where employees were leaving for higher salaries.[115] Further, Chen testified that he reviewed the exit interviews prepared by employees who left, and noticed that a number of employees were leaving because of dissatisfaction with salaries and or promotional opportunities. As a result of Chang's recommendation, and Chen's review of the exit interviews, Chen, after consulting with Wu decided to give an increase, as of October 1, 2001. According to Chen, even though business was still "very bad", it was decided to give a "symbolic" increase. Chen asked Chang what the industry increase was for 2001. Chang replied about 5-6%. Chen asked Chang to calculate the entry level % increase for employees, based on increases of $100.00 to $150.00 per month. Chang calculated the average to be 2.5. to 2.6%. Respondent decided to give raises only to General Schedule employees and assistant managers, and no raises for deputy managers and above.

Chang prepared a document dated September 5, 2001 explaining the justification for the increases, to be granted as of October 1, 2001. It reflects that the average increase for Respondent's employees was 2.6% as compared to the average salary increase in the industry of 4.00%. It also reflects the Government (GS) increase of 2.70% and 3.70% for the CPI. The document also indicates as follows:

> EGA NYC 2001/07/01 salary adjustment as follows:
>
> A. Salary Increase Background
>
> 1. 2000 was a prosperous economic year with the lowest U.S. unemployment rate, i.e. a mere 3.9%, in decades, 2001 in comparison has seen a little dip and decline, but the private sector salary increase is still above 4% (see table above).
>
> 2. Since 1998/07/01 till now, US private sector salary increases are: year 1999-6.75%, year 2000-6.4%; year 2001-4%.

[114] In note that at another point in his testimony, Chen asserted that he did not say, that profit was down in 2001, but only that lifting was down. Chen added that in 2001, "we did make money."

[115] Chang mentioned that Respondent's turnover rate was 12-13%, which Chen viewed as too high.

> However, within EGA's relatively lower profitability, EGA year 2000 salary increase was only 4.46%. Based on the resignation statistics, i.e. 116 employees resigned between 1999/July to 2000/July, and 117 employees (70 with 1 to 3 years seniority) resigned between 2000/July to date (2001/SEPT), it is clear that EGA need to offer comparable salary increases to attract and retain employees.
>
> B. Employees Receiving Salary Increases
>
> Employees who have satisfactorily completed initial evaluation by 2001/July/1, exclusive of EGA union employees and the five top Management EVP's and above. In sum, a total of 468 employees will be considered for salary increase.
>
> C. Salary Increase Suggestions:
>
> Present US Offices' (exclusive of LAX union employees & VCR's DJVP Andy Jen whose salary will be increased based on USD) salary totals at US $2,122,075. The 2001/July/1 salary increase (exclusive of LAX union employees & VCR's Andy Jen) total volume will be US $55,189 (2.60%).

The document further explains that most of the increases (2.17%) were performance related raises, based on the grades in the evaluations of the employees. A small portion of the increases (0.43%) were increases to employees in certain locations such as Salt Lake City, Dallas, and Chicago, where market conditions required additional increases, plus some specific increases for certain individuals.[116]

In early May of 2002, Chen met with Wu and Chang to discuss a possible July 1, 2002 increase. Chen testified that business was in recovery, volume was increasing ships were full, and he expected a very good year. Chen added that he wanted to give a "relatively good" salary adjustment to make up for previous years.

Chang told Chen than Respondent's salaries were already 10% below the industry average, and he expected a 6% increase in the industry for 2002. Chang added, as he had in prior years that turnover is still a problem, and Respondent needed to be competitive, in order to retain employees. Chen testified that he concluded that he would attempt to make up the 10% difference this year, and in the future if business continues to improve, make up the rest in later years. Chen came up with figures of $300.00 to $500.00 per month, and asked Chang to calculate the percentage increase for these amounts for employees. A day or two later, Chang reported back to Chen that for high cost areas, such as N.Y., L.A., San Francisco, and Chicago, $400.00 represented an increase of between 8 -10%, and $300.00 for low cost areas would yield a similar percentage increase. Chang sent a memo to Chen dated May 15, 2002, confirming the 8 to 10% salary adjustment. Chen testified further that he discussed the issue with Wu and his three EVP's and they all agreed, except that Jimmy Kuo suggested some

[116] These additional increases did not include any New York employees, except for Walter Lanling and Jason Lowe, who as a result of a transfer from Chicago to New York, had not received increases to bring them up to New York City standards. They received additional raises of $200.00 and $300.00 to make up for this inequity.

additional amounts for outstanding sales employees, and Chen concurred. Thus, according to Chen the decision on the amounts of the increases was made in mid to late May, and Chang was instructed to prepare a written recommendation. Chang did so, dated June 6, 2002. This recommendation, unlike previous documents reflecting the decision on wage increases, did not contain supporting documents, such as comparable wage surveys, articles from Journals or charts of U.S. Government raises and CPI figures. Chang testified that he did not include these items, because he was busy dealing with issues concerning Respondent's response to the union campaign.

In any event, the document prepared by Chang, dated June 6, is entitled RECOMMENDATION, and lists the raises to be given to the various groups of employees and their locations. It reflects a $400.00 monthly increase for the five high cost cities, including New York, and $300.00 for the employees in other areas. It also includes a $500.00 per month increase for all Deputy Managers and $600.00 for JVP's and above. Additionally, it reflects additional raises for certain sales employees and Port Captains.

The document also summarizes the average for these increases as 9.13% for U.S. employees, and 11.12% for employees in Canada. Notably unlike prior justifications, this document did not contain any narrative justification for the raises.

Chen testified in great detail as to the various factors that he relied upon in making his assessment that business had substantially improved by May of 2002, and why he believed it would continue to improve during 2002. Chen asserted that he began to notice in the last quarter of 2001, a pickup in cargo liftings. However, he wasn't sure if this pickup would continue as 2002 began. In early 2002, Chen contends that he observed cargo liftings continue to increase so that by January and February of 2002, Respondent's ships were 90% full, and by April, Respondent ran out of space. Chen's testimony in this regard is corroborated by Buckley as well as by Respondent's records, which show increases in volume over the prior year (measured by T.E.U's) of 12.5% in January of 2002, 44.3% in February, 18.3% in March, 45.7% in April and 49.9% in May. Chen also testified, corroborated by Buckley that at the end of 2001, China became a member of the WTO, which created a substantial increase in Respondent's East Bound traffic, since tariff's were reduced as a result of China's membership.[117] Additionally, according to Chen, in January of 2002, he met with Respondent's Principals in Taipei, wherein he was told by the Principals that they expected their business to grow and suggested that Respondent increase staff to keep pace with the expected increases in business. Further Chen was told that Hatsu, based in England would join the Transpacific service in April, which would increase business, and LT which became a principal in 2001 also expected increases in tonnage. HATSU and LT were formed in order to take advantage of trade with China, since due to the political situation between Twain and China, Respondent could not do business directly with China, but HATSU and LT could do so, since they are based in England and Italy respectively.

Furthermore, Chen asserts that prior to March 1, Respondent had completed negotiations with its major customers,[118] Wall Mart and Target, wherein Wall Mart to year committed to increase volume by 10% over the prior year and Target agreed to a 15% increase. According to Chen, this agreement sets the standard for commitments from other customers,

[117] However on cross examination, Chen admitted that he did not know if Respondent's business actually increased as a result of China joining the WTO, and did not recall which items from China had been highly tariffed.

[118] Respondent negotiates a contract with the customers on behalf of its Principals.

and contracts with other customers, agreed upon in March and April, also showed increases in volume commitments.

Further, Chen testified that based on his experience, the uptick in Respondent's business would. inevitably be followed by increases in rates. Also in March, Chen learned that it was decided at a meeting of the Transpacific Stabilization Association (TSA)[119] to extend the peak season surcharge of $300.00 to an extra month, starting on June 1, instead of July 1.

Buckley corroborated Chen's testimony in this regard, and through Buckley, minutes of the TSA March meeting were introduced and confirmed that such an increase was agreed upon. Furthermore, Buckley testified that a general tariff increase of $300.00 per FEU effective May 1, 2002[120] was also agreed upon at the TSA meeting. Buckley also furnished some testimony that the $300.00 general increase had been implemented in some way by Respondent. However his testimony was unclear and vague, as to precisely how and when and with which customers. In any event, Respondent introduced no documents, no contracts, or any other evidence that established at what point, if ever, it was able to obtain the $300.00 per FEU increase agreed upon by the TSA. Indeed, as noted above, Chen testified that agreements had been reached with the main customers Target and Wall Mart in January and February, in which a volume commitment was increased, but no testimony was offered that the agreements with Wall Mart or Target contained the $300.00 increase, or indeed that it contained the extension of the peak surcharge by one month, agreed upon by TSA.[121] The TSA minutes also reflected that in the industry volume was projected to increase by 5 to 7% for the rest of 2002. Buckley testified that Respondent had projected an increase of 10% for that period.

The TSA minutes reflect that members were attempting to restore rate levels to pre May of 2001 levels, suggesting that rate levels had decreased after May of 2001. The article from the shipping news, dated 3/25/02 introduced by Respondent, also indicates that the TSA executives reaffirmed their goal of restoring 2002-3 service contract rates to May 2001 levels, by increasing rates by $300.00 per FEU effective May 1, 2002. Buckley testified in this regard that the contract rates signed by Respondent were at a decent level, but because of ships not being filled, the customer can and did renegotiate the rates and chop prices. Thus according to Buckley, Respondent's revenues in 2001 were "plummeting," and the proposed increase of $300.00 was in part to bring back rates to previous levels. Buckley further testified that the highest levels for rates was reached in 2003.

Respondent also introduced a chart, which was prepared from Respondent's records, which purports to show Respondent's change in revenue. This chart included only revenue from liftings, and not from other sources. The chart demonstrates that for 1999-2000, Respondent's revenue's increased by 7.33%, 2000-2001, it decreased by 14.22%, 2001-2002, the revenue increased by 20.51%, and in 2002-2003, it increased by 40.03%.

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[119] The TSA is a group of carriers joined together to create stabilization for pricing and capacity. They have antitrust immunity to discuss increases and surcharges. Respondent is not a member of TSA, since it does not own vessels. Respondent's Principals are members.

[120] FEU is a forty foot container.

[121] I note in this regard that the 3/26/02 Shipping News article introduced by Respondent, reflected that the TSA agreed to raise rates by 3% effective May 1, and that more than half of the contracts with major shippers had already been settled. However, contracts with smaller shippers were still to be negotiated, and TSA would strive to raise its rate level by making its resolve to raise $300.00 per FEU clear.

Thomas Chen testified that revenue in 2002 increased by 10% over 2001. However, Respondent's position paper listed revenues broken down by first half of year and second half of year. These figures show a decrease of $91,628,573 representing approximately a percentage decrease of nearly 10%, for the 1st half of 2002, as compared to the first half of 2001. Respondent made no attempt to explain these figures. The position paper argued that based on projections of revenue, based on increases in volume, that revenue would increase substantially in the second half of 2002. The position paper also stated that "nearly a 31 million increase in revenue is expected over this year compared to 2001, when the impact of September 11's tragedy was felt."[122] Chen also testified as noted above, that when he made his decision on what wage increases if any to grant in 2001 and 2002, he reviewed monthly reports prepared by Jimmy Kuo on business conditions, which showed volume, income expenses and gross profit.[123] Chen further testified that these reports showed that gross profits were gradually going down in May of 2001, and that in May of 2002 its gross profits were gradually improving.

Chen added that he made the decision to grant the increases in mid May.[124] Chen was also asked why he decided to give flat across the board increases, rather than merit based increases, as in the past. He replied that Respondent was behind the industry in salaries, and it wanted to keep up with the market by making up the difference (10%). Chen also insisted that at the time that the wage increase was discussed in mid May, the only knowledge that he had about union activity was the one card that had been found in late April or early May. Chen insisted that the subject of the Union was not mentioned during the discussions about the wage increase, and the fact that he had seen a union card played no role in his decision to grant the increase. He added in that regard that since he had seen only one card, the significance of that one card was not clear, and Respondent was not just adjusting the salary for Morristown workers, but for all of Respondent's facilities, and it was trying to address the issue of the high turnover rate.

Chen also testified that he knew that the salaries of Respondent's L.A. clericals covered by the union contract was $24.00 to $30.00 per hour, but he wasn't sure if that was more or less than the Morristown employees were making. In any event, Chen asserts that Respondent did not make such a comparison during the discussions about increases, and did not consider the wages of the unionized L.A. employees in making its decision.

In that regard, Spano testified that the average hourly rate for L.A. employees was $32.00 per hour in July of 2002. Spano adds that the average hourly rate for Morristown

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[122] I note that none of Respondent's witnesses testified that the events of September 11 had adversely affected Respondent's business. To the contrary, its witnesses testified that 9/11 caused a reduction in travel and consequent spending by individuals on other items such as home building. Indeed, Respondent's witnesses contend that the turnaround in Respondent's business began in the fourth quarter of 2001, immediately after 9/11.

[123] None of these documents that Chen testified that he reviewed in 2001 and 2002 were produced, although Chen admitted that Respondent had them available. Further, Kuo did not testify.

[124] Chen did not specify precisely when he made the final decision, other than it was in mid May, after Chang gave him a memo reflecting that calculations based on raises of $300.00 - $400.00 per person would be in the 8-10% range. This memo was dated 5/15/02. Chen testified that "a few days later," he discussed the issue with Respondent's EUP's, and raises were agreed upon, with the addition of extra money for some sales employees, at the suggestions of Jimmy Kuo.

employees, after the July 1, 2002 raise took effect was $26.50 per hour.[125]

In May of 2003, Chen and Chang met once again to decide upon the increases for July of 2003. Both Chen and Chang testified that business continued to improve in 2002 and 2003. According to Chang, Respondent's price increase had been successful, and its ships were going out fully loaded. Chang informed Chen that Respondent even after the 2002 increase, was still 7-9% behind the market. Chen suggested an across the board increase of $200.00 for clerks, which Chang calculated to be about 5-6%. It was decided to grant $200.00 increases to all G.S. employees, including Assistant Managers, $300.00 for Deputy Managers and Managers, and $400.00 for Vice Presidents.

Additionally, partial performance related raises were granted for employees who received 4 on their evaluations of $100.00 and $150 for employees who received scores of 5. This resulted in an increase of 4.82% for the across the board portion of the raise, and 0.5% for the performance related portion, for all of Respondent's employees nationwide.

For Respondent's bargaining unit employees, all of the approximately 114 employees received the $200.00 increase, while 28 employees, having received evaluation scores of 4 received an additional $100.00 and 2 employees, who received scores of 5, received an extra $150.00 per month.

A document dated June 19, 2003, prepared by Tiffany Ting, of Chang's staff[126] reflected the raises granted, as described above, but provided no discussion about the reasons for the decision, and did not include any supporting documents.

Respondent also introduced, through Chang a chart, detailing Respondent's turnover rate for the years 1998 through 2003. The calculations were made on December 31 of each year, and consisted of the average number of employees employed by Respondent throughout each year. The document was created in 2004 for this trial, and was obviously not used by Respondent in deciding on any of the increases that it granted. Nonetheless, as noted, Respondent's witnesses testified that turnover has been substantial problem for Respondent for years, and was a factor in many of its decisions on wage increases in recent years. The chart shows that Respondent's turnover rate was 6.65% in 1998, 12.48% in 1999, 15.02% in 2000, 12.37% in 2001, 5.87% in 2002, and 6.84% in 2003.

General Counsel on rebuttal, called Brian Francella, an accountant, who furnished testimony concerning his analysis of Respondent's Financial Statements and Tax Returns for the years 2000 through 2003. He prepared a document which he attached to his report, which represented a schedule of Respondent's statements of Income and Expenses for these years.

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[125] I note that during the campaign, the Union made reference to the wages that the Union had obtained in L.A., as $32.00 per hour effective 7/1/02 and $33.00 per hour effective 7/1/03, and promised to negotiate better pay and conditions than Respondent accepted in L.A., because Respondent's headquarters are in Morristown.

[126] In this regard, Chang testified that he was busy during this period of time dealing with a strike called by Respondent's Port Captains, so he assigned Ting to prepare the "RECOMMENDATION," and did not have time to include any supporting documents.

This document is as follows:

Evergreen America Corporation
Schedule of Consolidated Statements of Income
Years Ended December 31, 2003, 2002, 2001 and 2000

	2003	2002	2001	2000
Revenue:				
Commissions	$ 73,052,289	$ 55,084,665	$ 50,200,723	$ 58,590,314
Inland Services	42,108,147	49,002,423	50,198,471	48,751,389
Property Rental	8,429,657	9,876,940	10,091,182	9,102,659
Total	$ 123,590,093	$ 113,964,028	$ 110,490,376	$ 116,444,362
Expenses:				
Equipment rental and related repairs and Maintenance	$ 23,265,650	$ 20,730,277	$ 20,153,441	$ 22,364,611
Other rental and maintenance expense	6,932,142	5,952,041	5,748,008	5,743,960
Communications and utilities	1,313,787	1,303,370	1,152,946	1,502,218
Payroll and related services	48,368,794	43,672,971	38,606,648	38,100,690
Profit sharing and retirement plans	5,099,555	4,568,177	3,984,105	3,957,362
Commissions to sub-agents & selling expenses	8,313,446	8,179,126	6,269,489	6,834,223
Depreciation and amortization	6,164,633	8,131,584	12,066,085	13,399,859
General and administrative expenses	12,315,858	9,991,781	9,301,293	10,306,368
Total	$ 111,773,865	$ 102,529,327	$ 97,282,015	$ 102,209,291
Operating income	$ 11,816,228	$ 11,434,701	$ 13,208,361	$ 14,235,071
Other income (expense)				
Interest income	$ 641,682	$ 2,213,027	$ 1,594,359	$ 1,892,147
Interest expense	(1,656,720)	(2,605,400)	(4,362,270)	(6,163,660)
Gain (Loss) on sale & disposal of prop. & equip., net	3,277,992	(119,436)	-	-
Litigation settlement	-	-	(1,124,274)	-
Other income	-	-	12,709	-
Other expense	(241,093)	(2,338)	-	61,148)
Total	$ 2,021,861	$ (514,147)	$ (3,879,476)	$ (4,332,661)
Income before income taxes	13,838,089	10,920,554	9,328,885	9,902,410
Provision for income taxes	(5,481,584)	(1,050,888)	(4,601,764)	(5,373,479)
Net income	$ 8,356,505	$ 9,869,666	$ 4,727,121	$ 4,528,931

The key observations included in Francella's testimony and his report, is that notes to Respondent's financial statement reflects that sometime in 2002, Respondent received an income tax refund of $5,138,000. Francella testified that the net income shown in the document for 2002 includes the refund of over 5 million. Therefore, according to Francella, once one subtracts the tax refund, it shows a net income of $4.8 million for 2002, comparable to the $4.7 million in net income for 2001.

However, as Respondent points out, the document also reflects the expenses for Respondent for these years, and shows an increase in payroll expenses for 2002 of approximately $5,000,000 over 2001, demonstrating that Respondent was able to incorporate the wage increases granted in 2002 into its balance sheet, without the reduction of net income.

Respondent further argues that the evidence discloses that Respondent was aware of the tax refund when it made its decision to grant the increases in May of 2002. In support of that contention, Respondent called Jack Chen, the Senior Vice President and head of Respondent's supervisory division, who is in charge of financial management of the company. Chen was not employed by Respondent until August 20, 2002, but through Chen various documents were introduced into the record with regard to the tax refund issue.

These documents show that the refund checks were not actually received by Respondent until November of 2002. However, these documents and Jack Chen's testimony show that the refunds were for an alleged over withholding by Respondent for the years 1995 through 1998. The issue involved was that Respondent withheld 30% of overseas advisory fees, based on its prior accountant's advice. In early 2001, a new accountant had a different view, and believed that the 30% should not have been withheld. Therefore, Respondent filed for refunds for the years 1995 through 1998.

The documents and Chen's testimony also establishes that sometime prior to April 15, 2002, the IRS auditor had agreed in part with Respondent's position, and stated that he would recommend approval of a refund of over $5,000,000. A letter to Terry Chang an official of Respondent, from the accountant, dated May 13, 2002, reflects that a tentative agreement on the amounts due Respondent had been reached between the IRS auditor and Respondent's accountant. However, the letter indicates that the auditor must submit the case for approval for "joint committee" review. The letter reflects further that the case needs to be reviewed at the IRS Manhattan office, then to the Philadelphia Service Center, and finally to the National office in Washington. The auditor estimated that the review would take from six months to the end of the year for approval and the issuance of the refunds.

Thomas Chen furnished no testimony that he had been notified about the status of the refund request in April or May, or at anytime prior to the decision being made to grant the increases.[127] Thomas Chen never testified that he considered the possibility of tax refund being issued in making his decision to grant the increases that Respondent decided to grant in July of 2002.

Francella also testified, consistent with various items in his report that Respondent substantially increased its retained earnings, reduced its long term debt and increased its cash position in both 2002 and 2003, all of which Francella conceded, meant to him that Respondent's financial condition was "getting healthier" throughout this period.

[127] Respondent argues that Thomas Chen's testimony indicates that he was aware of the tax refund in prior to May of 2002. I do not agree. Thomas Chen was asked a question by Respondent's attorney, how did the year 2002 turn out for Respondent from a financial point of view. Thomas Chen replied that in 2002, profit before tax was 11 million, as compared to 9-10 million in 2001. He added that in 2002 we also have a 5 million tax credit. Thus it is clear that Thomas did not testify that he knew that the refund would or even might be approved prior to May of 2002.

As I have observed above in connection with the grant of various benefits by Respondent, where as here, the wage increases were granted during the critical period, an inference is drawn that the increase is unlawful. However, Respondent may rebut the inference by showing that it would have taken the same action, if the Union were not on the scene. *United Airlines Services, supra; Desert Aggregates, supra.* Even where an employer justifies the timing of such a benefit, the amount of the benefit may be unlawful. *Desert Aggregates, supra; Comcast Cablevision,* 313 NLRB 220, 248-250 (1993).

In assessing whether Respondent has met its burden of rebutting the inference of illegality, the Board looks to several factors, as detailed in *B&D Plastics,* 302 NLRB 245 (1991). These factors include:

(1) The size of the benefit in relation to the purpose for granting it
(2) The number of employees receiving it
(3) How employees reasonably would view the purpose; and
(4) The timing of the benefit

In applying the principles of this and other precedent to the instant facts, since the raise was granted on July 1, 2002, and appeared in employees' paychecks a few days before the election, an inference is warranted that the increase was unlawful.

In attempting to meet its burden of rebutting this inference, Respondent initially argues that it was unaware of any significant union activity, when it made its decision to grant the increases in mid May of 2002. This contention is based on the testimony of Thomas Chen, who asserted that the only knowledge of any union activity that he had in mid May, was that one unsigned card had been found at its facility, several weeks before. I do not credit Chen's testimony in this regard. I note that the Union began its organizational drive in mid April, and that immediately thereafter and continuing through April, May, June and July, Respondent committed numerous unfair labor practices, as I have detailed above. These findings included several instances of unlawful interrogations beginning in April, and continuing through early and late May, as well as several instances of unlawful solicitation of grievances in early May. Therefore, I conclude that Respondent was aware that the Union was conducting a full fledged organizational campaign, and that cards were being solicited and signed, all prior to mid May. I find Chen's implicit testimony that he did not believe that the one card that he found was significant, and Respondent simply decided to "wait and see" what happens to be disingenuous and not credible. In fact Respondent did not just "wait and see," but instead immediately embarked on a unlawful campaign to convince employees that they did not need a union, and could obtain benefits directly from Respondent, without being represented by a union.

Notwithstanding this finding, Respondent did establish that raises are normally granted on July of each year. Thus the timing of the raises are not unlawful, and this factor in *B&D Plastics,* tends to support the legality of the increase. Indeed General Counsel does not contend otherwise.

However, the amount of the increase is another matter, and General Counsel urges that Respondent's "excessive" increases are sufficient to establish its unlawfulness. The amounts given in July of 2002, of $400.00 per month is clearly substantially higher than in the past, and in fact as General Counsel points out, for most employees, represents wage increases exceeding their raises over the last three years combined.

Respondent in attempting to demonstrate that it would have given the same amounts to employees even if the Union was not on the scene, points to the testimony of Thomas Chen,

and Buckley, as well as documentary evidence that it submitted. Respondent contends that Respondent's decision was based on the desire to remain competitive in wages, to stem its high turnover rate, and because of substantial improvements in its business at the time of its decision. *McAllister Towing & Transport Co.,* 341 NLRB # 48, *ALJD* slip op. at 30 (2004); *Marine World,* 236 NLRB 89, 90-91 (1978); *LRM Packaging Inc.,* 308 NLRB 829, 834-835 (1992).

However, I conclude that Respondent's evidence is insufficient and unconvincing, and falls short of meeting its burden of proof, that it would have granted the increase of $400.00 per month to each employee in the unit in July of 2002, had the Union not been on the scene.

Respondent also argues that its raise in 2002 was consistent with the raises granted in 1998, when it gave raises averaging 9.03% throughout the country. However the evidence with respect to the 1998 raise was not broken down, so we do not know what the average raise was in 1998 for employees in the New York – New Jersey facility. This is particularly significant, since in past years, Respondent's raises were primarily performance based, as opposed to across the board as in 2002. Further even if it is assumed, which the record does not establish, that the employees at the instant location also received an average of 9.03% in 1998, the fact that raises for the past three years combined, were less than 2002, is still sufficient to establish an "excessive" amount of increases in 2002.

Furthermore in 2002, unlike in prior years, Respondent granted a wage increase solely on an across the board basis, without any consideration of performance of the employees. I find that this fact which has not been adequately explained, substantially undermines Respondent's defense. Chen testified in this regard that he decided on an across the board increase, because he wanted to make up by 10% the substantial wage differential between Respondent's employees and its competitors. However, I find this purported explanation unconvincing. Respondent has for the past several years, calculated its wage increases based on a average percentage for all its employees in North America, and still based substantial portions of the increases on performance, by utilizing its evaluation system. Therefore, it could still have made up by 10% the wage differential, and still used the evaluation system. Thus, Chen's explanation for this change in its system is not persuasive, and I find pretextual. I note that in prior years there were employees that received no raises at all by virtue of Respondent's use of a partial performance related system for calculating raises, including eighteen employees in 2001. The failure of Respondent to distribute raises based on performance, contrary to prior practice, has been found to be significant indicia of unlawful intent. *Veteran's Thrift Stores, Inc.,* 272 NLRB 572 (1983); *Honolulu Sporting Goods,* 239 NLRB 1277,1279 (1979); *Tower Enterprises,*182 NLRB 382, 386 (1970).

I note in this regard, testimony in the record that some employees were not expecting any raises in 2002, because they had received poor evaluations, and or that they expected the raises to be small, due to statements made to them by supervisors. Therefore, I conclude that Respondent's decision to grant substantial across the board increases would have caused employees to reasonably view the purpose of the increases at least in part, in response to the union activity and pendency of the election. *Comcast Cablevision, supra.* See also, *DMI of Delaware,* 339 NLRB 409, 410, 411 (2001).

Chen's further testimony that the amount of the raises was due to his desire to make up for prior small increases to meet competitive increases, and to remedy Respondent's severe turnover problem is also not persuasive. The facts reveal that Respondent had been significantly behind the industry with respect to increases for several years, and that turnover had also been a significant problem as well since at least 2000. Yet Respondent made very

little effort to rectify these problems, despite constant requests from HR to alleviate these issues, and statements made by employees in exit interviews, and to Spano in his QMD reviews, that wages were a major reason for employees leaving. However not until the Union began organizing, did Respondent finally address these issues. *Comcast Cablevision, supra* at 249; *Cardinal Products, Inc.,* 338 NLRB 1004, 1016 (2003); *Pembrook Management,* 296 NLRB 1226 (1989); *Skaggs Drug Centers,* 197 NLRB 1240, 1244 (1972). As the ALJ in *Skaggs Drug* observed, in language particularly apt here;

> It may be that some increases in Respondent's wage scale was required by competitor increases. But Respondent has failed to explain satisfactorily why it suddenly became necessary to adopt a wage increase large enough to eliminate the differential in wage scales which it had heretofore been satisfied to accept. *Id* at 1249.

Respondent asserts that it did make attempts to resolve these issues by granting increases in 2000 and 2001 despite poor business. However, these contentions have not been substantiated. In 1999 Respondent granted no raise at all, allegedly due to restructuring costs and poor business. In June of 2000, it decided on an increase averaging 4.46%. In the Respondent's justification for that increase, Chang wrote that due to the severe turnover problem the fact that Respondent had not given a raise in nearly two years, and its salaries were well below industry standards, that "a reasonable salary adjustment is a must."

Significantly, the document also reflects that "cargo lifting is increasing," employee's workload is increasing, and the "job market is so hot." Thus an increase of 4.46% was suggested and agreed upon. Therefore, in June of 2000, after a year without a raise, with turnover a substantial problem, with Respondent's cargo lifting increasing, and Respondent well below industry standards in salaries, Respondent gave an increase only averaging 4.46%, with the performance related component constituting a large portion of the increase.

In contrast, in 2002, after having given a raise, albeit a small one in 2001, Respondent decided on a huge across the board increase more than double the 2000 increase to allegedly make up the difference. What is the explanation for Respondent's decision to be so generous in 2002? I conclude that the most plausible explanation for this sudden largesse by Respondent is the appearance of the Union attempting to organize its employees.

Respondent attempts to justify its decision by asserting that by May of 2002, its business had substantially improved which warranted and motivated its decision to grant such a large increase. While Respondent's evidence through testimony and exhibits indicates that as of May of 2002, it had significantly increased its liftings over the past year, it has not demonstrated that there had been at that time any increases in revenue or in profits. While Chen testified that profits and revenues were gradually increasing at that time, this testimony has not been substantiated by any documentary evidence. To the contrary, Respondent's position paper establishes that for the first six months of 2002, Respondent's revenues were substantially lower than they had been for the comparable period in 2001, when business was allegedly so bad that it postponed its July raise to October.

While Respondent's witnesses furnished some testimony concerning rate increases recommended by the TSA having been put into effect, no specific testimony was offered as to when that increase was agreed upon with its customers. More importantly, no contracts with customers, or other documentary evidence was presented to establish when, if at all, Respondent's customers had agreed to the rate increases recommended by TSA. Indeed,

Respondent's own testimony establishes that the contracts with Wall Mart and Target were negotiated prior to the recommendation by TSA, suggesting that the contracts with these customers did not contain these increases.[128]

Thomas Chen testified that he consulted with Jimmy Kuo during 2001 and 2002, and that Kuo presented various documents to Chen that demonstrated increases in Respondent's profits and revenues, during these periods of time. Yet, Kuo did not testify, and none of the financial documents, allegedly looked at by Chen were introduced into the record by Respondent, although Chen admitted that they were available. I find that the absence of Kuo's testimony, as well as the failure to produce these documents, significantly undermines Respondent's defense. Further, it is appropriate to draw an adverse inference, that Kuo's testimony would not have supported Respondent's position on this issue. *Gerig's Dump Trucking,* 320 NLRB 1017, 1024-1025 (1996); *Overnite Transportation,* 329 NLRB 990, 1014 (1990); *International Automated Machines,* 285 NLRB 1122, 1123 (1987).

Further evidence undermining Respondent's defense is the credited testimony of several employees, that during 2002, supervisors of Respondent informed them in numerous conversations that business was not good, the company is not doing well, business is tough and other such comments. More importantly, Kuo told Paola Magbanua sometime after April 15, that Respondent is in tough times now, but don't worry the employees are going to get a raise, and most importantly of all, Chuck Yeh told Kumad Patel in early July, that Respondent is not doing well, but Patel will be getting a $400.00 raise to make up for years when the raise was not as good. [129]

I find that these comments further cast doubt on Respondents position that there had been a substantial improvement in revenue as of May of 2002. The statement made to Patel by Yeh, who was a Vice-President, that although Respondent is not doing well, she would be receiving a $400.00 raise to make up past raises is particularly significant. While Respondent argues that this testimony supports its defense, since it mentions making up for past increases, I cannot agree. While Yeh's remark does confirm that $400.00 was granted, at least in part to make up for past small raises, it also undermines Chen's testimony, by stating that Respondent is not doing well. The obvious message to be gleamed from Yeh's remarks to Patel, particularly since they were made in the context of anti-union statements, is that despite Respondent not doing well, Patel and the other employees will still be receiving a large increase to make up for past years of small or no increases, and that she and they do not need a union to have their concerns met.

This message is in fact the same message expressed directly from Thomas Chen to the employees in his speech of May 23, where he told employees that "their mutual concerns can be addressed directly and without intermediaries," and on July 16 (the day before the election), where Chen said "If EGA does not make the effort to deal with our employees' concerns now, we are simply giving renewed opportunities for unions to come into our workplace."

I find that Respondent's conduct is a classic example of the "fist inside the glove" conduct condemned by the Supreme Court in *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964). See, *Lampi L.L.C.,* 322 NLRB 502, 503 (1995). More specifically the Supreme Court

[128] In any event, Respondent adduced no evidence that then contracts with Wall Mart or Target contained the increases in rates.

[129] I note in the same conversation, Yeh expressed anti union sentiments to Patel.

observed:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. (Footnotes omitted)

Such an inference here is particularly prominent, in view of the numerous other unfair labor practices that I have found above to have committed by Respondent, especially the solicitation of grievances, promises of benefits, threats to close and the grant of a number of other benefits, both pre and post election. I conclude that in the context of these unfair labor practices, reasonable employees would have viewed the 2002 wage increase as having been conferred by Respondent in order to undermine support for the Union. *Reno Hilton,* 319 NLRB 1154,1155-56 (1995); *Lampi L.L.C., supra.; Comcast Cablevision, supra;* See also, *Overnite Transportation, supra*, at 1014 (wage increase merely part of Respondent's strategy to improve conditions so that employees would not feel it necessary to seek the aid and support of the Union).

Respondent also argues that it has established that its officials, particularly Thomas Chen reasonably believed, based on their experience, that the increase in liftings that had been continuing for months would inevitably lead to increases in revenue and profits, justifying its decision to authorize a substantial increase. Respondent also asserts that it was aware at the time of the decision in May, that it would be receiving a half a million dollar tax refund from the IRS.

Dealing with the latter contention first, I do not agree with Respondent's assertion. The evidence discloses that as of May of 2002, there was no final or even tentative decision reached by the IRS that Respondent was entitled to the refund that it had requested. While there had been a agreement with the IRS auditor to this effect, it was made clear that several levels of review were still required before final approval of the decision, and that a decision was not expected for six months or more. More importantly no testimony or evidence was offered by Chen or any other official of Respondent, that Respondent considered the possibility of the tax refund, when it made its decision to grant the increases.

However, I do find that Respondent has established that it, though Chen reasonably believed that improvement in revenues and profits, would eventually follow, from the increases in liftings, and indeed to some extent, this prediction was borne out by the increases in revenue by the end of 2002. However, I find this insufficient to convince me that Respondent would have granted such a substantial across the board increase, without considering performance, absent the appearance of the Union. Respondent acted extremely conservatively in making up for nearly two years of no increases in 2000, where liftings were also increasing, and I find that their sudden generosity can be attributed to the union's organizing its employees. In this regard, I specifically do not credit Chen's testimony, that the appearance of the Union was not even a factor in his decision to grant the increases, and I conclude that it was in fact a major factor. In any event, I find that Respondent has fallen short of establishing that it would have granted this increase, even if the Union was not on the scene.

Respondent also argues, as it did with respect to the other unlawful benefits described above, that the July 2002 raise is not unlawful, because identical increases were granted in all its North America locations. However, as I have observed infra, such a defense is not persuasive, where, as here there is evidence establishing the anti-union motivation of the

increases or the grant of the benefit. *McAllister Towing, supra;* ALJD slip op. at 30, *Sears Roebuck, supra; Leisure Lodge,* 297 NLRB 327 (1986), *c.f.; Network Ambulance Services,* 329 NLRB1 fn.4 (1999) (Board relies on corporate wide grant of benefits, to rebut inference of illegality, but states clearly that the premise of such findings, is that where there is no other indication of an anti-union motive, a multi unit entity is unlikely to have granted a benefit to all of its employees solely for the purpose of affecting an election that affected only a few.)

Here, contrary to *Network Ambulance, supra,* there is substantial evidence indicating an anti-union motive, as I have detailed above. Moreover, I also note that the election did not affect "only a few", but affected the facility of Respondent with the largest number of employees, and also represents Respondent's North American Headquarters. Furthermore, the facility with the second largest number of Respondent's employees, is Los Angeles, which is already organized. Thus it is reasonable to conclude, which I do, that Respondent feared that its other facilities might face union organizing, should the Union be successful here. Thus the corporate wide huge wage increase, is well as the other unlawful benefits found above, would likely have been calculated to discourage potential union activities in all of its non union facilities. *McAllister Towing, supra; Holly Farms, supra,* at 274; *Sears Roebuck, supra.*

Finally, I also note that Respondent despite its substantial increase in liftings by May of 2002, made no effort to explain to employees that such increases in business and or the other factors that were mentioned during the trial, were responsible for Respondent's decision to grant huge across the board increases in 2002, unlike the prior three years. Indeed, to the contrary, Respondent's supervisors were telling the employees, while urging them to vote against the Union, that business was poor or not good, but employees would nonetheless be receiving raises. Therefore, without any other explanation given to the employees, I find that employees would reasonably be left with the impression that their substantial across the board increases were caused by the only manifest difference in the past 3 years, the appearance of the Union. *Comcast Cablevision, supra.* Thus by telling the employees that they do not need a union, and then granting the extraordinary increases of July 1, 2002, without offering any explanation of how and why these increases were determined, Respondent engaged in actions having the effect of leading employees to believe that the amounts were determined, at least in part, in response to the appearance of the Union. By such conduct, Respondent has violated Section 8(a)(1) and (3) of the Act. I so find. *Comcast Cablevision, supra.; Lampi L.L.C., supra; Overnite Transportation, supra.*

Turning to the July 1, 2003 wage increase, once again it is appropriate to draw an inference that the increase was unlawfully motivated, since the objections were still pending. However, in this instance, I find that Respondent has rebutted the inference of illegality.

The increases in July of 2003 of slightly over 5% was consistent with prior increases, such as the increase granted in 2000, and substantially less then the 1998 increase of over 9%. Further the 2003 increase was unlike the 2002 increase that I found to be unlawful, partially performance based, and consistent with prior years in that respect. Further, the evidence discloses that Respondent's revenues did increase in 2002, and that 2003 was its best year financially for the past ten years. Additionally by 2003, Respondent had the use of the half a million dollar tax refund, that it did not have in May of 2002.

Accordingly, I conclude that Respondent has demonstrated that it would have granted the July 2003 increases that it did, even if the Union was not on the scene, and I recommend that the complaint allegation with respect to that action be dismissed.

J. The Promotions

As detailed above the majority of Respondent's employees in the bargaining unit are classified as General Schedule or GS employees. Respondent also utilizes a classification entitled Assistant Manager or AM which is also in the bargaining unit. There is no dispute that the AM position, although it has the title of assistant manager entails no significant supervisory responsibilities. In fact several witnesses testified, without contradiction, that there is essentially no difference in job functions between GS and AM, and that the promotion to AM is essentially a reward for superior performance, which entails additional compensation.[130] However, in order to be promoted to the next level of District Manager (DM), which is a supervisory position, not in the unit, it is necessary to be an AM first.

In July of 2002, Respondent employed 115 employees in the unit. Prior to the July promotions, 62 employees were GS and 53 already had the title of AM. Thus 62 employees were eligible for promotion to AM. On July 1, 2002, 20 employees in the unit were promoted to AM. Thus after the promotions, Respondent had 73 AM's and 42 GS employees.

In 2001, Respondent's records reveal that Respondent promoted five employees from GS to AM,[131] and in the year 2000 there was only one such promotion, that of James Chien on January 1, 2000. Included in the 20 employees promoted by Respondent on 7/1/02 to AM were Chris Yu and Sherry Yao. Yu was notified of her promotion by her supervisor Kevin Huang on or about July 1. Huang congratulated Yu and informed her that she was promoted to AM effective July 1. During that same conversation, Huang told Yu that the union is no good, and asked her if she had decided which "side to choose" in the election. Yu replied that she has not chosen a side yet. Huang then stated remember the company treats the employees good, "don't let the company down."

Yu testified that she was surprised that she was promoted, because the evaluation that she had received in late 2001 was not good, and as a result she did not receive a raise in 2001, although most everyone else in her department did receive a raise that year. These were five employees in Yu's department including herself. Prior to July of 2002, all but Yu had already been promoted to the AM position.

Sherry Yao was employed by Respondent for 13 years, as of July of 2002. As I have detailed above, Yao was spoken to about the union by Jimmy Kuo, wherein Kuo told her that the union is not good for her, is controlled by the Mafia and was trying to take money from her. Kuo asked her for suggestions about changes in the company or any complaints about her treatment by Respondent. Yao responded that she worked for Respondent for a long time and had not had a promotion. Kuo responded that it was difficult to judge why she had not been promoted and some people who were promoted may be lucky, and she has not been lucky. According to Yao there were about 10 employees in her department, and for the past 3 years (1999, 2000 and 2001), there were no promotions in that department.

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[130] The additional compensation is $150.00 per month.

[131] While Chang testified that he believed that in 2001, Respondent promoted from 8-10 bargaining unit employees to AM, Respondent's own records establish that his estimates were not accurate, and that on January 1, 2001 5 employees, Patty Wang, Christina Wong, Tom Wang, Wayne Ting and Jim Yang were promoted to AM and received raises of $150.00 at that time. The records also reveal that as of 1/1/01, Respondent employed 60-65 employees eligible for promotion to AM in its New York – New Jersey offices.

During the course of the union campaign, Yao wrote a letter complaining about her treatment by Respondent during her pregnancy in 1994. The letter was published and distributed by the union, entitled "Echo from a worker." The letter asserts that during her pregnancy in 1994, her department head at the time was abusive and showed no respect. Therefore Yao asserted that she "did not dare take early leave," and as a result suffered a miscarriage. She added that she went to the Personnel Department to complain, but received no satisfaction. The letter concludes by urging employees to "make the right choice for yourself and your family."

While the letter was unsigned, based on the contents therein, Respondent knew that Yao had been involved. She was called into to see Dan Grogg. Grogg told Yao that he thought that she was referring to him as the supervisor who had allegedly been abusive to her, and wanted her to tell him that it was not him. She told him that she was not pointing at him. Grogg asked her to tell everyone that he was not the person mentioned in the letter. Subsequently, Yao's immediate supervisor at the time, Frank Marrone told her that Respondent was preparing a letter saying that her miscarriage had nothing to do with company policy, and wanted her to sign it. Thereafter, Yao received a copy of such a letter that Respondent wanted her to sign, but she told them not to issue it until she speaks to her lawyer. The letter was not issued by Respondent.

Yao also testified, that the supervisor whom she was referring to in the letter was Anderson Kao. Further, in prior years on two or three occasions Kao informed her during her evaluations, that he had sent a promotion recommendation for her to Human Resources, and Kao subsequently informed Yao that he had not heard from Human Resources.

After she received her promotion, Kao, who was no longer Yao's supervisor spoke to her about the promotion. Kao told Yao that the reason she was promoted was because he had worked very hard on her behalf. According to Yao, she was skeptical about Kao's assertion since he was no longer her supervisor, but believed that he wanted to take credit for the promotion.

Another employee who was promoted in July of 2002, was Fanny Kong. She, like Yu had not received a raise in November of 2001, which indicates that she had received an evaluation score of 1 at that time.

Respondent adduced no evidence by way of testimony, or by submission of any documents, evaluation forms or promotion recommendations, to explain why it decided to promote Yu, Yao, Kong, or indeed any of the other seventeen employees promoted on July 1, 2004.

In January of 2003, Respondent promoted four employees from GS to AM in the bargaining unit. The employees were Bill Ng Zhu and Kevin Kan promoted on 11/01/03, and Peter Wan and Virginia Huang promoted on 7/1/03. In January of 2004, Respondent promoted one employee Mary Kwon from GS to AM. As of January 2003, Respondent had 42 GS employees eligible for promotion to AM.

According to Chan and Chen, Respondent's policy has been to grant promotions on January 1 and or July 1 each year.[132] The procedure is that supervisors are asked to submit recommendations for promotions of their staff members, along with an evaluation form, which

[132] Most of the promotions are granted in January.

rates employees in various categories, with scores of 1-5.[133]

For example, the record reflects that on 3/22/99, supervisors were requested to submit a list of candidates for promotion on or before March 31, 1999.[134] However, on June 20, 1999 another e-mail was sent to supervisors, announcing that due to "continued market pressures and escalating operational costs", salary adjustments and promotions normally scheduled for July 1 will be postponed. Apparently there were no promotions in 1999.

Chang became Head of Personnel in August of 1999. According to Chang, Respondent promoted 10 employees throughout North America from GS to AM, in January of 2000. Chang asserts, corroborated by Chen, that Chen's predecessor as president, Owen Wu, did not encourage promotions from GS to AM, because they essentially do the same work. Thus Wu believed that unless the employee is doing an "extremely good job", they should not be promoted to AM. While Chang does not recall a directive issued by Wu to supervisors concerning Wu's views on promotions, he states that it was mentioned at various supervisors meetings. Although Chang could not recall how many promotion recommendations were received in 1999, for January 2000 promotions, he believed that a fair number of them were rejected by Wu, to arrive at a total number of 10 promotions.[135] Chang also testified that on July 1, 2000, 6 or 7 employees companywise were promoted to AM. He couldn't recall if any promotion recommendations were rejected at that time. There were no promotions amongst clerical employees in New York in July of 2000.

Chen took over as president in October of 2000. According to both Chen and Chang, Chen had a decidedly different view of promotions from GS to AM than Wu. Chen believed that promotions to AM should be encouraged as a reward for loyalty and recognition, to improve morale, and to have a pool of employees in the AM position available for promotion to DM. When Chen took over as president he discussed his view of promotions with Wu, who had become Chairman. Although Wu continued to have a different opinion, he told Chen that since he is president, and in charge, Wu would respect his decision in this area. However, both Chang and Chen concede that Respondent did not communicate to lower level supervisors who prepare the promotion recommendations, that Chen had a different view of promotions to AM than his predecessor.

After his discussion with Wu, Chang informed Chen that the recommendations for promotion, effective January 1, 2001 should be submitted. Thus Chen authorized Chang to so notify supervisors. Accordingly, a memo was sent on 10/3/00 requesting that recommendations be submitted by October 6, 2000. The form used contains the identical language used in the 1999 memo, when Wu was president.

The record reflects that another memo was sent to supervisors on October 26, 2000. According to Chang, the purpose of this memo was to let managers know that they can give more names for promotions. However, a reading of the memo does not corroborate Chang.

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[133] This is the same evaluation form that Respondent would use in calculating the portion of the wage increase for employees that is based on their performance. The recommendations are then reviewed and evaluated by senior management, who make the final decision.

[134] The document request that supervisor's submit "a proper explanation of reasons supporting the promotion."

[135] As noted above, there was but one promotion from GS to AM in New York in January of 2000. The record does not reflect any breakdown of where the other nine promotions came from.

The document is entitled "AM Promotions – Recommendation", and reads as follows:

> The top management has issued specific instructions regarding AM promotions as follows:
>
> When considering promotion to AM, the candidate must actually be performing jobs of important substance rather than general tasks. He/she must be in a capacity to provide significant assistance to the supervisor or possess leadership qualities while acting as a team leader. In addition to performance evaluation results, factors such as attendance (including both leave requests and tardiness records) and the candidate's responsibilities should be evaluated.
>
> In light of this new information, please review the list you submitted (if any) and make adjustments as necessary. Please forward your revised list to EGA NYC/PSN by e-mail on or before 10/26/00 (Thursday).
>
> Thank you for your cooperation.
>
> EGA NYC/PSN

In any event, supervisors submitted recommendations for promotion, and in November of 2000, senior management, which included Chen, Wu, Chang, and the E.V.P.'s met to decide on the promotions to be granted on January 1, 2001. At that time, neither Chen nor Chang could recall how many recommendations for promotion from GS to AM were submitted, but they both recall that some were rejected by Chen. Again neither Chen nor Chang could recall how many were rejected.

According to Chen, the promotions that he rejected in 2000, as well as in later years were essentially for the same reasons, that their evaluation score was not high enough. Chen further testified that when he considered promotions, he generally considers seniority, as well as evaluation scores. He would require an employee to be employed for at least 2-3 years before he would approve a promotion. If employees scores at least 3 on their evaluations, he would consider them for promotion, and the longer they are employed, the better chance they have for approval. If employees score 4 or 5 on their evaluation, he would approve promotions for as little as 2-3 years experience.[136] Respondent approved promotions to AM from GS for 25 employees companywide as of January of 2001.[137]

According to Chang, in July of 2001, Respondent promoted 6-7 employees companywide to AM.[138] Chang did not recall if any recommendations were disapproved at

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[136] Chen added however that even if an employee's score is 2, if that employee has a lot of seniority, he would consider that employee for approval.

[137] As also noted above, five of these promotions were in the New York location amongst the clerical employees, who were in the bargaining unit as of the 2002 election. Chang testified that companywide there are 7-9 offices where clerical employees are employed, who perform essentially the same work as performed by members of the unit. According to Chang, there are approximately 300 such employees in these offices performing such work.

[138] The record reflects that none of these promotions were in the New York location.

that time. Chen did not provide any testimony concerning promotions in July of 2001. Nor did the record reflect a document sent to supervisors requesting recommendations for the July 1, 2001 promotions.

The next document concerning promotions, was issued on 11/7/01. The first paragraph of the document which is entitled Promotions/Demotions, includes standard language requesting recommendations for promotions by supervisors with supporting explanations of reasons.

However, the next paragraph indicates that based on instructions from management, "as a general rule no promotions from GS to AM will be accepted this year." It adds that in very limited circumstances, such promotions will be considered, and criteria is set forth for employees to be considered. It includes a grade of 4 or above, at least once during the past three years, and outstanding attendance. Recommendations were due by November 9, 2001. The record does not reflect how many promotion recommendations were received, but according to Chang only 2 or 3 were approved, all in Respondent's Salt Lake City office.

In May of 2002, about a week or two after the discussions about wage increases, Chen instructed Chang to send out a memo, requesting promotion recommendations, to be effective July 1, 2002. The memo was dated May 20, 2002 and it contained language, requesting promotion recommendations as in prior years. However, the first sentence of the document states as follows: "Due to difficult economic conditions promotions from GS to AM were granted only in a few limited cases. As a result, the process will be conducted again for July 2002 to evaluate suitable cases."

The memo concludes by the addition of another sentence, which does not appear in prior memos. It states, "when proposing, please consider the need for a sense of leadership required within certain groups to provide assistance to supervisors."

Neither Chen nor anyone else from Respondent issued any instructions to supervisors to submit more recommendations than prior years.

After the recommendations were received, as in prior years, senior management met to approve or disapprove the recommendations. According to both Chen and Chang, Respondent received more recommendations in 2002 than in 2001, but they could not recall how many. They both testified that Respondent went over the names, and made decisions on each, similar to prior years. Both Chang and Chen testified that Chen rejected some of the recommendations from supervisors, but neither were certain how many. Chang estimated that Chen rejected about a dozen, while Chen testified that he believed that he rejected from 3-5 in 2002. Chen also testified that he rejected about the same number of recommendations in 2002, as he did in 2001.[139] Respondent approved 45 promotions from GS to AM companywide. This included 20 promotions in the bargaining unit in New Jersey. Also there were 23 promotions from GS to AM of employees who perform clerical functions similar to that performed by bargaining unit employees, but in other locations in North America. Further, Respondent also promoted 17-18 computer employees. They are not classified as GS or AM, but have titles such as engineer, Junior engineer and professional engineer. Finally, Respondent promoted 27-28 employees

[139] In this regard, Chang testified that in his experience, Owen Wu rejected more recommendations for promotion than did Chen. Responodent produced no recommendations for promotions. According to Chang, Respondent does not retain these documents, and they are discarded after they are used.

into higher management positions.

Both Chang and Chen testified concerning the reasons for the increased number of promotions in 2002. According to Chang, the reasons were (1) that there had been a delay on promotions, so that there were essentially no promotions in January 2002, except for exceptional cases; (2) Respondent had been experiencing increased business, due to two new Principals, the number of employees were increasing, so more promotions were needed; and (3) Chen, unlike his predecessor, Wu encouraged promotions.

Chen testified as noted that he did not inform any supervisors that there should be more promotions in 2002. However, he was asked why there was a difference in the number of employees approved for promotion as between 2001 and 2002. He testified that because business was increasing, the section managers believed that they needed to promote more employees to take more responsibilities to handle the additional business. Further, Chen testified that since Respondent expected more business from its two new Principals, Respondent needed to train more people to be eligible for DM, an actual supervisory position.

Respondent's position paper also made reference to promotions. It states that Respondent has a long history of promoting from within. The paper lists company wide promotion numbers that range from 12 in 1999 to 79 in 2002. It also lists 40 promotions in 2000, and 46 in 2001.

In the year 2002, it breaks down promotions by office. This breakdown shows that of the 79 promotions companywide, 40 came from the New Jersey office. The next highest number was 7, in L.A. and Baltimore. The list does not breakdown the promotions any further, but it appears to include promotions from GS to AM, AM to DM, and other higher level promotions.

The position paper also states as follows: "Moreover, the number in 2002 is slightly larger than usual because immediately after September 11, 2001, the Group Chairman limited all promotions pending the fallout from the tragic events of that day. Thus, only a handful of promotions were given from third quarter 2001 to July 2002."

No testimony was provided by any of Respondent's witnesses, that the events of September 11 had any bearing on its decision to limit promotions scheduled for January 1, 2002.

In assessing the legality of Respondent's promotions in July of 2002, once more the starting point is the inference of illegality that it is appropriate draw from the fact that the promotions were announced shortly before the election. The burden then shifts to Respondent to rebut this inference by showing that it would have granted these promotions, even if the Union was not on the scene.

In that regard, I find that Respondent has established that the timing of the promotions was not unlawful, and would have been the same, whether or not the union election was pending. Thus Respondent normally promotes employees on January 1, but it has also promoted some smaller amounts of employees on July 1, in the past. The evidence discloses that Respondent postponed its January 1, 2002 promotions, for legitimate business reasons, prior to any union organizing. I have found above that Respondent's liftings were increasing in the spring of 2002, which I find would have motivated Respondent to promote employees in July of 2002, absent the union organizing its facility. Indeed, the General Counsel does not contend otherwise.

General Counsel does assert however, as it did with regard to the wage increases granted in July, that Respondent authorized an extravagant number of promotions in 2002 in violation of the Act. It is to that issue that I now turn.

Respondent promoted 20 employees in the bargaining unit from GS to AM on July 1, 2002. This represents approximately one third of the employees eligible for promotion at the time. (62-65 employees.) Since Respondent promoted 45 employees from GS to AM companywide, the figure for New Jersey represents about approximately 45% of Respondent's promotions.

In contrast, in January of 2001, Respondent promoted 25 employees from GS to AM, and in the bargaining unit, Respondent promoted only five employees, representing 20% of the total GS to AM promotions. If one adds the 6-7 promotions in July of 2001, of which none were from New Jersey, the percentage is reduced to less than 15%.

Further in the year 2000, Respondent promoted but one employee from the bargaining unit to AM, while promoting a total of 16-17 companywide. This huge disparity in promotions between 2002 and other years, as well as between New Jersey and other locations vis á vis promotions, represents substantial evidence that Respondent manipulated the promotion process to ensure a higher number of promotions in the unit, to influence the results of the election.

Respondent although making no attempt to explain or justify these numbers, instead argues that its own statistical analysis demonstrates that the promotion rate among employees who were eligible to vote in the election was actually slightly lower than the promotion rate of Respondent's employees outside the voting group. This Respondent contends the % of promotions to eligible voters represents 17.39% (20 out of 115). It then contends that Respondent's total headcount excluding eligible voters was 392, and out of that number there were 70 promotions, (25 GS to AM outside the unit, 17 in the computer department, and 28 supervisory or management) which comes to a % of 17.86.

However, I disagree with the significance of Respondent's analysis. Its assertion that the appropriate figure to utilize to measure percentages is the total number of employees in the unit (115) is misplaced. As General Counsel points out 53 of these employees already had the title of AM, so were not eligible for promotion to AM, which is the issue under consideration. Therefore the relevant figure to use, is the number detailed above, the number of GS employees eligible at the time for promotion. That leads to as noted a % of over a third (20 out of 62 employees) far higher than 17.39%. The record does not contain evidence as to the number of Respondent's employees eligible for promotions on the non unit or supervisory positions, so an appropriate comparison as set forth by Respondent is not possible.

In my view, the appropriate comparison is to promotions from GS to AM in unit and non unit positions, particularly at locations other than New Jersey. As detailed above, there is record evidence as to these numbers, and they reveal the significant disparities as disclosed therein.

Respondent has attempted to explain the overall increase in companywide promotions, (According to its position paper, nationwide, promotions increased from 46 in 2001 to 79 in 2002), which it argues also explains the increase in the number of bargaining unit promotions in 2002. Respondent points to several factors, including the alleged substantial increase in business, the obtaining of two new Principals by Respondent, and the alleged different philosophy in evaluating promotions from GS to AM between Wu and Chen. As to the evidence

concerning increased business and the obtaining of two new Principals, I have considered these assertions with respect to Respondent's decisions to grant wage increases in 2002. While I have concluded that Respondent did establish that business volume had increased substantially by the spring of 2002, I also was not persuaded that there had been increases in revenue or profits at that time, contrary to the testimony of Chen, and that therefore Respondent did not establish that it would have granted such a large across the board increase to employees, had the union not been on the scene. I find similarly here. While it is reasonable to conclude, which I do that based on increases in business and the lack of promotions in January 2002, Respondent would have promoted some unit employees in 2002, I cannot conclude that it would have promoted anywhere near 20 employees.

With respect to testimony concerning the different philosophies with regard to promotions by Wu and Chen, I cannot find that Respondent has proved that such differences in philosophy, affected the number of promotions in 2002. Notably, there is no evidence that Chen ever notified any supervisors that he had a philosophy of encouraging GS to AM promotions, as opposed to his predecessor, Owen Wu. Nor does the evidence reveal that any supervisors, other than Chang, ever became aware of it or that it influenced their decision to recommend or not recommend employees for promotions. While Chang did testify that in his view, Chen rejected more promotions recommendations than Wu, that contention was not established, since no written documentation was provided to support that assertion. This record does reveal a substantial difference between GS to AM promotions by Respondent companywide between 2000 and 2001 when Chen began evaluating promotions. (17 such promotions in 2000, under Wu, and 31-32 in 2001 approved by Chen). However, this difference is not sufficient to explain the huge jump of promotions in New Jersey, 20 from 5 in 2001 and 1 in 2000.

An examination of three of the promotions approved in 2002, substantially undermines Respondent's defense. Chris Yu testified that she did not receive a raise in 2001, and the evaluation that she received in late 2001 was poor. Thus she was very surprised to have been promoted in July of 2002. Further when she was informed of her promotion by her supervisor, Kevin Huang on July 1, he told her that the union is no good, unlawfully interrogated her about how she intended to vote (the election was scheduled for two weeks later), and when she indicated that she has not decided, he said to her to remember the company treats employees good and "don't let the company down." This evidence strongly supports the contention that Yu's promotion at least was motivated by an attempt to influence her vote. Thus Yu's last evaluation was not good, and Huang's conduct in informing her of her promotion, while interrogating her about her vote and reminding her that the company treats employees good (i.e. she has been promoted, despite a poor evaluation), is more than sufficient to establish that her promotion was unlawful.

Similarly, the evidence discloses than Fanny Kong was also promoted in 2002, although she did not receive a raise in 2001, which indicates a poor evaluation at that time. While the unlawfulness of this promotion is not as clear, in the absence of any statements towards Kong, it raises sufficient suspicions, which have not been explained. Respondent has introduced no evidence to explain why it promoted Kong in 2002, despite her previous poor evaluations. Therefore the evidence is sufficient to find this promotion unlawful as well.

Finally, Sherry Yao who was employed by Respondent for 13 years by 2002, was asked by Jimmy Kuo during an antiunion tirade, for suggestions or complaints.[140] Yao replied that she had worked for Respondent for a long time and had not had a promotion. Kuo responded that it

[140] I note that I found this inquiry by Kuo to be unlawful solicitation of grievances.

was difficult to judge why Yao had not been promoted, and surmised that Yao had not been lucky.[141] Further, Yao wrote a letter during the campaign which was published by the union, complaining about her treatment. Respondent became aware that the unsigned letter was authored by Yao, and attempted to persuade her to sign a letter modifying the letter that had previously been published by the Union. Thus it is clear that Respondent was aware that Yao was a strong union adherent, and had previously complained to management about Respondent's failure to promote her after working there for so many years. The above evidence, once again strongly supports the conclusion, that I draw, that Respondent's decision to promote Yao was unlawfully motivated.

To be sure, it is of course possible that the evaluations utilized by Respondent to decide upon the promotions in July of 2002 for Yao, as well as Kong or Yu were substantially improved. It is also possible that 2002 was the first year that supervisor's recommended any of these employees for promotions. However, Respondent made no attempt to and did not establish any of these possibilities. Indeed, it made no attempt to either call the supervisors involved in these promotions or to introduce the evaluations by the supervisors, which Respondent allegedly reviewed when it decided upon the promotions.[142]

Moreover, with respect to Yao, she credibly testified that her former supervisor, Anderson Kao told her previously that he had recommended her promotion two or three times in the past, and that Human Resources had failed to approve these recommendations.

Yao's situation is particularly compelling, since Chen testified that he generally approves promotions for employees who score 3 or above, and even for employees who score a 2, he will consider approval, if the employee has been employed for a long time. Yao was employed by Respondent for 13 years in 2002, and more importantly for 12 years in 2001. She also, insofar as this record discloses, has received scores of 3 each year on her evaluation. Yet she was not promoted in 2000 when Wu was in charge or in 2001, when Chen with his allegedly more lenient philosophy was in charge of promotions. Thus, based on Chen's own testimony, Yao should have been promoted in 2001, yet she was not, and no explanation was offered by Respondent for its failure to promote Yao in 2001, despite her falling within Chen's guidelines for approval, and despite Kao telling Yao that he had recommended her for promotion. In 2002, after she requested a promotion in response to an unlawful solicitation of grievances from Respondent, she was promoted, two weeks before the election. I find the evidence overwhelming that her promotion was unlawfully motivated.

I therefore conclude that the promotions of Yao, Yu and Kong were motivated by an intent to discourage support for the union, and violative of the Act. *Cardinal Home Products,* 338 NLRB 1004,1006 (2003).

As to the other seventeen promotions, I cannot conclude that all of them were unlawful. I have concluded that Respondent's decision to permit promotions in July of 2002, to replace the January 2002 promotions that it had postponed, would have occurred, despite the union

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[141] Respondent's records reveal that prior to the July 2000 raise, she scored 3 on her evaluation and received an increase of $75.00 on the performance portion of the raise. For the raise granted in November of 2001, Yao received a score again of 3, and received a raise of $100.00

[142] While Chang testified that Respondent does not retain the recommendations for promotion submitted by supervisors, he gave no such testimony with respect to the evaluations used by Respondent. These evaluations are available and were not produced by Respondent.

campaign. However, I have and I do conclude that Respondent would not have promoted 20 at that time, and I also find that it would not have promoted seventeen as well.

I need not and do not conclude precisely how many promotions would have been authorized, absent the union's campaign, but I do find, as detailed above that Respondent has not established that it would have promoted 20 or even 17 employees, if the Union was not on the scene. In that connection, I emphasize the disparity between 2001 and 2002, both years when Chen, with his allegedly more lenient philosophy of encouraging promotions from GS to AM was in charge. Yet in 2001, Respondent promoted only 5 employees from the unit, while promoting from 20 to 27 employees from other locations. This represents a % of from 15 to 20% of companywide promotions. However, in 2002, with the union on the scene and an election pending, Respondent promoted 20 bargaining unit employees, an increase of 400%, from 2001, while promoting 25 employees to AM in non unit positions. This represents an increase to 42% of promotions. Respondent did not introduce a scintilla of evidence, attempting to explain why the percentage of promotions in the unit increased so drastically vis á vis non unit GS employees, who were not involved in the election. In the absence of any such explanation, a finding of unlawful motive is warranted.

Further, in 2003, after business has continued to improve, based on Respondents own evidence, Respondent promoted only four unit employees from GS to AM, similar to its numbers of 2001 and slightly higher than in 2000. Thus Respondent in 2000, 2001 and 2003 combined, which includes two years under Chen's regime, promoted 10 bargaining unit employees to AM. In 2002, two weeks before the election, it promoted 20, a 100% increase over the combined total of two years before and one year after. In these circumstances, the conclusion is warranted which I draw, that Respondent manipulated the promotion process in order to influence employees to withdraw their support for the union and to vote against the union in election. *Cardinal Home, supra; Comcast Cablevision, supra.* It has therefore violated Section 8(a)(1) and (3). I so find.[143]

IX The Termination of Michael Gunshefski

A. Facts

Michael Gunshefski was employed by Respondent since November 13, 1989. He worked in the Import Traffic department for ten years, and was transferred to Traffic Export until his termination. His immediate supervisor at the time of discharge was Guy Siniscalchi, who in turn reported to Dan Grogg.

Gunshefski attended the first union meeting held on April 15. He signed a card at that meeting and returned the card to Levy. He also asserted that he took some blank cards and subsequently distributed some cards to fellow employees. Gunshefski testified three separate times during the course of the trial. On each of those occasions he furnished testimony

[143] As noted above, I need only find as I have described above, that Respondent would not have promoted 20 unit employees in July of 2002. It is not essential to precisely decide how many employees Respondent would have promoted, absent the union's appearance, in order to find a violation. However, since a *Gissel* bargaining order is sought, that issue could be relevant. I therefore conclude that Respondent has shown that due to the increase in business and the fact that it had not promoted anyone to AM in January of 2002, that it would have promoted in the unit, somewhere between 7 and 10 employees in July of 2002, had the Union not been on the scene.

concerning his alleged card distribution and union activity. Initially, on March 12, 2004, Gunshefski testified that he gave out cards to Barbara Blake, Lenny Vargas, Ken Waldron and Joanne Eisen, all of whom are employed in the Sales department. According to Gunshefski, Blake filled out and signed her card and returned it to him. He adds that Vargas, Waldron and Eisen all said to him that they did not want to be represented and threw their cards out.

Gunshefski next testified on April 26, 2004. At that time he testified that he attended union meetings "gave out cards to a few people," and cooperated with the Region during the investigation. During cross-examination on April 27, 2004 Gunshefski was shown a document, prepared by Levy, which Gunshefski was asked to sign, concerning the cards that he had allegedly obtained.[144] The statement, when prepared by Levy detailed that Gunshefski had received one signed and dated card from an employee designating the Union as his/her bargaining agent. After receiving it, Gunshefski claims that he recalled that he had also received a signed card from his brother, John Gunshefski, also an employee of Respondent. He then, after speaking with Levy, crossed out one, and wrote two on the document, signed it, had it notarized and returned it to Levy in the mail. Gunshefski furnished no details of how and when he had received a signed card from his brother.

Finally, Gunshefski testified in rebuttal, on September 1, 2004. At that time, he testified that he gave out cards to more than four sales employees. In addition to the four employees that he had named previously, he added Ralph Camano, John Skalarsky and Dave Longo, as sales employees to whom he gave cards, and also told them that the cards were to bring a union into the company. Gunshefski did not testify on September 1, as to what if anything, these additional sales employees did with their cards. Gunshefski also testified on September 1, that he was a member of the union's organizing committee, along with the Magbanua's, Chiang, and some unnamed others.

With respect to the latter assertion, Levy confirmed that Gunshefski was a member of the organizing committee. However, numerous documents, which were introduced into the record, were prepared by the Union and or its committee members, and listed members of the organizing committee. None of these documents mentioned Gunshefski's name. Further, most members of the committee who were listed in these documents, such as Chiang, Chi, Ting, and the Magbanua's testified in this proceeding. None of these employees confirmed that Gunshefski was a member of the organizing committee.

Moreover, both Barbara Blake and John Gunshefski testified as witnesses on behalf of General Counsel concerning the discharge of Michael Gunshefski. Yet neither employee was asked about Michael Gunshefski's testimony that he had obtained signed cards from both of these employees. Additionally, General Counsel never offered into evidence, any card allegedly signed by Blake. It did offer John Gunshefski's card, as I have detailed above. The testimony was that David Chiang had given the card to John Gunshefski, and that the next day, Gunshefski told Chiang that he had mailed the card to the Union.

Gunshefski also furnished testimony concerning several alleged conversations and discussions with Siniscalchi concerning the Union. According to Gunshefski, two or three days after the April 15 union meeting, during a cigarette break, Siniscalchi told him that Respondent was aware of the Union. Gunshefski further claimed in his initial testimony that during subsequent cigarette breaks, Siniscalchi told him that he thought that the Union would be the

[144] This document was similar to a number of other such statements, that Levy asked other card solicitors to sign in February of 2004, in connection with the 10(j) proceedings.

downfall of the company, and that it could wind up closing or moving it to North or South Carolina, where unions could not come into the area. When asked about this conversation by the undersigned, he changed his initial testimony and stated that during the cigarette break, Siniscalchi merely said if the Union went through, the company could move, and that he (Siniscalchi) was worried he could lose his job also. The alleged statement by Siniscalchi about moving to North or South Carolina, was made according to this version of Gunshefski's testimony, during a department meeting conducted by Siniscalchi about a week after the April 15 union meeting. During this meeting, which Gunshefski asserts was attended by all 10 of the employees in his department, Gunshefski asserted on his direct testimony that at that meeting, Siniscalchi stated that the management was aware of the Union and added that he thought it was bad for the company, could cause the company to move, and he was worried himself about the company moving. Under examination by the undersigned, Gunshefski claimed that at the meeting, Siniscalchi said that the company could move to North or South Carolina, where either there were no union, or unions were not allowed.

Siniscalchi testified and denied making any of the remarks attributed to him by Gunshefski. However, Siniscalchi did recall a conversations with employee Allison Taylor at work, where Gunshefski and perhaps other employees such as Maria Magbanua were also present. Siniscalchi asserts that Taylor initiated the discussion by asking if it is true that if the Union wins, Respondent would either layoff people, fire people or close. Siniscalchi replied "No", but added that whether there is a union in place or not, if a company is not doing well financially there is always a possibility that the company may layoff or move or close. After answering another question from Taylor about wages, Siniscalchi testified that he told her to read all the material that was being handed out by both sides and make up her own mind.

Maria Magbanua testified as a witness on behalf of General Counsel. As I have detailed above she testified similarly to Gunshefski with respect to statements made by Grogg and Siniscalchi at meetings conducted jointly by them. As noted, I credited the mutually corroborative testimony of Magbanua and Gunshefski as to these events.

However, Maria Magbanua furnished no testimony concerning any meeting conducted solely by Siniscalchi, and did not corroborate Gunshefski's testimony that Siniscalchi discussed moving to North or South Carolina, or indeed moving at all, at any meetings. Magbanua did testify that she heard parts of a conversation between Taylor and Siniscalchi, during which Siniscalchi told employees to read and digest the materials from both sides and make up your mind and decide what you think. Magbanua also recalled Siniscalchi saying that if the company doesn't make money, even with a union, employees could still be laid off or lose their jobs. Further, Gunshefski submitted two affidavits in the summer of 2002, (prior to his discharge), and made no mention of one on one conversations with Siniscalchi during cigarette breaks, where the union was discussed or Siniscalchi talked about closing or moving.

After his termination, Gunshefski submitted another affidavit on November 13, 2002. In this affidavit, Gunshefski stated that Guy (Siniscalchi) "would also talk to me about the disadvantages of the union when we would go out for cigarette breaks. He would tell me that if the Union came in the Employer would be more likely to move."

According to Siniscalchi, the only discussion that he had with Gunshefski concerning the union during a cigarette break was, when Gunshefski allegedly told Siniscalchi that he did not like a lot of the things that was going on and that he was undecided on which way he was going to vote. Siniscalchi claims that he replied that if he was in Gunshefski's shoes, it would be a tough decision, but that he has to do "what's best for you and your family."

Gunshefski also testified that about a week after the April 15 union meeting, Eddie Lou, a Junior V.P. in sales asked him to come into Lou's office.[145] Gunshefski testified further that Lou informed him that he had been told by management that Gunshefski's name was on a list as one of the main or top union organizers. Lou allegedly then asked Gunshefski if he was for or against the Union? Gunshefski asserts that he replied "Yes," that he was for the Union, but he was thinking of changing his mind and not supporting the Union. Lou then replied, according to Gunshefski, that the union's not good for the company and he (Lou) did not think that Gunshefski should go through with the Union. Lou denied having such a conversation with Gunshefski, and denied telling Gunshefski or knowing anything about his being on a list by management, or about him being a union supporter, much less a union organizer. Lou does recall a discussion with Gunshefski about the Union, but asserts that Gunshefski brought up the subject, by stating that he disagreed with the way the Union was handling things, and if the election was held "today," he would vote against the Union. Lou claims that he replied, "Thank you for telling me," and said nothing further.

Gunshefski's first affidavit given in 2002, made no mention of Lou telling him that he was on a list of main union organizers. However the affidavit did state that Lou told Gunshefski "I was one of the top guys involved with the union." In his affidavit, given after his discharge, Gunshefski, stated that Lou had informed him that he "was on management's list as one of the union's organizers."

Lou also recalled that he first found out about the Union, when one of his sales managers, Ralph Camano gave him a blank union card and told him that it was a union card. According to Lou, he did not ask, nor did Camano tell him where he gotten the card or who had given it to him. Lou asserts that he didn't even read the card, but turned it over immediately to someone in Human Resources. Lou further states that he told the HR person that "one of my managers gave it to me."

On October 28, 2003, Gunshefski was on the telephone with Eddie Rinkowski, who is a vendor employed by Maher Terminal. Gunshefski testified that Rinkowski began the conversation by yelling at him and accusing Gunshefski of calling Rinkowski's boss, and allegedly said to Gunshefski, that Respondent should have updated its own "fucking system." Rinkowski added that the problem wasn't Maher Terminal's problem, but was Respondent's system's problem. According to Gunshefski, he had not in fact spoken to Rinkowski's boss about the problem. Gunshefski asserts that after Rinkowski had cursed at him, he hung up the phone, and then called Rinkowski a "fucking asshole."

Rinkowski testified as a witness for General Counsel.[146] Rinkowski testified that he did have a conversation with Gunshefski on October 28, 2003, during which he and Gunshefski had a disagreement about whose fault it was that there had been a booking error. Gunshefski stated that Maher terminal had made an error, and Rinkowski asserted that Respondent would have to fix the problem. Rinkowski did not testify to any cursing either by himself or Gunshefski. He specifically denied hearing Gunshefski curse at him during that conversations, and does not recall Gunshefski raising his voice. Rinkowski could not recall how the conversation ended but believes that Gunshefski simply told him that he would look into the matter.

[145] Lou had previously been Gunshefski's supervisor, and they continued to have a friendly relationship, even after Lou was no longer Gunshefski's supervisor.

[146] Rinkowski did receive a subpoena, but was also a member of a different local of the ILA.

Joseph Luzzi who was also called as a witness by General Counsel, testified that he spoke with Gunshefski, about a week after his discharge. Gunshefski informed Luzzi that he had been speaking with someone from the pier and then he hung up the phone and casually said "fuck you." According, to Luzzi, Gunshefski told him that he (Gunshefski) had been called into Dan Grogg's office and fired for cursing and that Grogg had claimed that Gunshefski had "screamed" into the phone.

Immediately after this incident, Dan Grogg summoned Gunshefski to come into his office. Grogg asked Gunshefski what had happened. He told Gunshefski that he and Jay Buckley had heard him curse on the phone. According to Gunshefski, Grogg said "you put me in a tough spot." Gunshefski told Grogg that he did not curse over the phone and that he had already hung up the phone when he cursed. Gunshefski also testified that he told Grogg about another employee named Julia who had previously cursed in front of Grogg. Grogg allegedly responded that he never heard Julia curse. Grogg told Gunshefski to return to work.

According to Grogg, on October 28, 2003, he heard Gunshefski say "fuck you," and then slam down the phone. Grogg claims that he observed that a number of employees in the office who had obviously heard Gunshefski's outburst were "visibly upset." He noticed that employees had stopped work and were looking around to see what had happened. When he called Gunshefski into his office, Grogg claims that he explained to Gunshefski that he had heard Gunshefski curse and that his conduct was unprofessional and egregious. Grogg added that he had worked for Evergreen for 23 years and had never heard anyone yell "fuck you" in the office, and that his conduct was disturbing to him (Grogg) and to the rest of the staff. Gunshefski replied that everybody uses that kind of language. Grogg answered that he had never heard it before. Gunshefski then told Grogg that he had hung up the phone, before he cursed. Grogg asserts that he told Gunshefski that it doesn't make any difference, he shouldn't have cursed in the office. According to Grogg, Gunshefski offered to apologize to Grogg. Grogg answered that it was nothing to apologize to Grogg, but there were 50-60 people in the office who were effected by his cursing and were upset by the language that he used. Grogg then asserts that he informed Gunshefski that the matter is "is not over," and to return to work.

At about 4:00 pm that same day, Gunshefski was called into Grogg's office. Siniscalchi was also present. Gunshefski asserts that Grogg informed him he was sorry he had to let him go for cursing on the phone that morning, and that "he had no choice." Gunshefski insists that Grogg said nothing about his prior record or about any attendance problems, and that Grogg mentioned only the cursing as a reason for the discharge. Gunshefski admitted that he became very upset after being informed of his termination, mentioned that he was a single parent, and yelled "fuck you" at Grogg. He also admitted that he slammed the door open when he left Grogg's office. Grogg and Siniscalchi both testified that Grogg told Gunshefski that he was being terminated because of his entire record including his attendance problems, as well as his cursing that morning. Gunshefski responded that he couldn't believe that Respondent was firing him for saying "fuck you," and that he had a child to support. Grogg explained that Gunshefski wasn't being fired just for cursing that morning, that his entire unacceptable past record was considered, and he had not made any improvement. Gunshefski then allegedly asserted that he had never been spoken to by Grogg about using bad language. Grogg allegedly responded that Siniscalchi had verbally warned him several times about using bad language in the office, and Gunshefski allegedly admitted that Siniscalchi had done so. At that point, Grogg turned to hand Gunshefski an envelope from Human Resources, but Gunshefski refused to accept it and began yelling "fuck you" several times to Grogg. Gunshefski then left the office and slammed the door open.

There is no dispute between the witnesses, that after his termination, and after Gunshefski cursed at Grogg in his office, Grogg followed Gunshefski to his desk, and watched him while he was clearing out his belongings. At that point, Gunshefski got up, came within six inches of Grogg's face and starting yelling "fuck you," fuck you" a number of times. While Gunshefski was yelling, his brother John and Paolo Magbanua came over to calm Gunshefski down and said "Mike that's enough." The employees persuaded Gunshefski to stop his cursing and to leave. They informed Gunshefski, "we'll talk to our attorney's."[147]

General Counsel adduced testimony from a number of witnesses, concerning the use of foul language at Respondent's facility. For example, Joe Luzzi, who admitted that he is a friend of Gunshefski's, was employed by Respondent, from January, 1995 to September,1999 in the Import Traffic department. His immediate supervisor was Anderson Kao who in turn reported to Grogg. Luzzi testified that he was unaware of any policy at Respondent, regarding foul language. Luzzi also testified that he himself on numerous occasions would curse, after hanging up the phone, and used words such as "asshole", "shit" or "dick". Luzzi asserts that Kao and or Grogg were within hearing distance on these occasions, and never said anything to him at the time about his cursing. Luzzi also testified that other employees such as Ian McMonigal, Phil Kimel and Anthony Lombardi would also frequently curse after hanging up the phone, and neither Kao nor Grogg said anything to these employees about their cursing. Luzzi also testified to observing an argument between Lombardi and Tracy Cowall in front of numerous employees, and Kao, where they were yelling and calling each other names such as "asshole" and "cunt." Kao, according to Luzzi made no effort to stop the argument and said nothing to either employee about the argument or the cursing. Another employee stepped in, and diffused the argument.

Capt. Meng testified that he heard his manager Johnny Chen say "fuck" at work, and that he (Meng) was unaware of any company policy prohibiting cursing in the workplace. Meng also testified that he heard Port Engineer Hsiung curse and say "fuck his mother," referring to another supervisor (Lu Chen), in the presence of supervisor Capt. Tso. According, to Meng, Hsiung was not reprimanded by Capt. Tso for this conduct and did not receive any letter from Respondent. Barbara Blake who is in the Sales department, testified that she was also unaware of any rule or policy prohibiting cursing, and that swearing was common in the workplace. However, Blake also testified that she knew that employees should watch their language in the workplace, and that from time to time, managers would at meetings remind employees that they should keep their cool and not to curse. Blake also testified that over the years, she heard two Sales managers Ralph Camano and Tom Gilbert use curse words such as "asshole", and "fuck". Blake also testified that she heard a number of employees use curse words in the workplace, including herself, in the presence of Grogg. Blake admitted that on some of those occasions, Grogg would tell her or other employees to calm down or to watch her language. In most of these instances according to Blake, the employees would be joking around, rather than cursing when they were mad. Blake also testified that she heard salesman Vincent Carnnivale and Anthony Lombardi curse in front of Grogg, and Grogg said nothing to them. Further, Blake recalled both Carnnivale and Tom Sinowitz use words such as "asshole" or "idiot" after getting off the phone, in front of Grogg without Grogg reprimanding them or speaking to them about such language. According to Blake, people are talking and letting out frustration. He (Grogg) "would have been saying it all the time, he would have been reprimanding people all the time, because it's used a lot."

[147] Grogg wrote a memo on 10/28/03, describing his version of the events of that day, which is essentially in accord with his testimony at the trial.

Finally, John Gunshefski testified that all five of the managers that he worked for over the years, have used profanity in the workplace, and that he heard employee Tom Wang frequently use curse words in the workplace without being disciplined. He asserts that he never heard any manager address cursing with any employees.

Respondent adduced testimony from Siniscalchi, Grogg, Chang, Spano, Buckley and Chen with respect to Gunshefski's termination. Their testimony is essentially consistent and corroborative. Thus after Grogg spoke to Gunshefski, he spoke to Buckley, whom he knew had heard Gunshefski's outburst, since Buckley had been walking towards Gunshefski, at the time that Grogg was acting similarly. Grogg asked Buckley what he had heard and seen. Buckley responded that he heard Gunshefski say "fuck you" and then put down the phone.

Grogg then spoke to Siniscalchi and informed him what had happened. Siniscalchi was not present when Gunshefski cursed, but was told about it by his assistant manager, who also informed Siniscalchi that Gunshefski was speaking to Rinkowski at the time. Grogg told Siniscalchi that this was a very egregious matter, and that particularly in view of Gunshefski's past record, that it was necessary to discuss the matter with Human Resources.

Siniscalchi and Grogg went in to see Spano. Chang was present for part of the time, but was in and out. Grogg reported that Gunshefski had cursed loudly over the phone, and that both he and Buckley had observed him curse and then put down the phone. Grogg also reported that Gunshefski that stated that he had cursed only after the conversation had ended, and he had already hung up the phone. It was then suggested that Rinkowski be called to get his version of the events. Siniscalchi then called Rinkowski and told him that there was an allegation that Gunshefski had cursed at Rinkowski during their conversation. According to Rinkowski he specifically denied to Siniscalchi that he had heard any cursing by Gunshefski. Siniscalchi asserts that the only response that he received from Rinkowski was "I have no problem with Mike," which Rinkowski allegedly repeated three times, when Siniscalchi pressed him about hearing Gunshefski curse.[148] At that point, the conversation ended, and Siniscalchi reported to the group that Rinkowski "didn't want to get involved."[149]

The participants then went over Gunshefski's record, which included a suspension the year before for attendance problems, as well as other written warnings. Siniscalchi also reported that he had verbally warned Gunshefski on several occasions about cursing in the work place, and had sent him an e-mail about cursing as well.

Both Siniscalchi and Grogg recommended that Gunshefski be discharged, based on his past record including prior warnings including warnings for cursing, and the final incident of loud cursing which visibly affected employees in the office. Spano and Chang did not offer any opinion, but suggested attempting to contact Respondent's attorney.

Later on in the day, Siniscalchi, Chang, Spano, and Grogg were called into Chen's office. Respondent's attorney was on a speaker phone. Siniscalchi and Grogg reported on the incident, as they had in the prior meeting with Human Resources. They again gave their recommendations for discharge, based upon Gunshefski's entire record, including the prior warnings, as well as the final incident of cursing in the workplace. Chen approved the decision and it was decided to terminate Gunshefski at the end of the day.

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[148] Rinkowski admits that he did tell Siniscalchi that he had no problems with Gunshefski.

[149] According to Siniscalchi, based on Rinkowski's responses, he believed that Rinkowski had in fact heard Gunshefski curse, but did want to say so and get involved in the matter.

Grogg, Siniscalchi and Chen all insist that they had no knowledge whether or not Gunshefski had signed a card for or was a supporter of the union. Gunshefski's prior record referred to above, consisted of a warning letter dated September 9, 2002. This letter reflects that Gunshefski had been given verbal warnings regarding the need for arriving on time and maintaining good attendance, and that he was close to expiring his available time off. Further, the memo states that at this time, all his available time had expired. Therefore he was informed that this was a warning, and that he must take immediate steps not to miss any additional time. The memo concludes by stating, "failure to improve your attendance will be cause for disciplinary action up to and including termination of your employment."

Notwithstanding this warning, on October 4, 2002, Gunshefski failed to report to work as scheduled. He was given another written warning, dated October 10, 2002, which repeated the prior warning, referred to the October 4 failure to report to work, and stated that "there must be significant improved and sustained performance in your attendance and continued good performance in all other areas. Failure to meet the above expectations will result in discipline up to and including termination."

On November 1, 2002, Gunshefski once more failed to show up for work. On November 4, 2002, Gunshefski was suspended for five working days. The memo detailed the prior warnings, and concluded with the following:

> "Any further unexcused absences will result in your immediate termination."[150]

On September 2, 2003, Jane Yeh of Respondent's H.R. Department sent an e-mail to Gunshefski, as well as Grogg and Siniscalchi, asking Gunshefski to provide an account of what happened on 7/8/03, since there was no punch in or leave requested for Gunshefski on that day.[151] Gunshefski replied by E-mail on September 2, 2003 at 3:05pm, "computer malfunction." This explanation did not satisfy Yeh, who in turn requested Gunshefski and Siniscalchi to provide some evidence that Gunshefski worked that day, such as phone records or e-mails.

After receiving these e-mails, Grogg and Siniscalchi spoke to Gunshefski about the matter. Grogg and Siniscalchi had also checked booking records for that day, and found no substantiation that Gunshefski had worked on July 8, 2003. Gunshefski initially insisted to Grogg and Siniscalchi that he had worked, but after being advised that Grogg and Siniscalchi had not found any evidence that he was there on that day, changed his story and said maybe he had called in sick and asked someone to punch in for him. Grogg told Gunshefski that he would be charged leave for that day. Gunshefski asked to use sick leave. Grogg then informed Gunshefski that he was almost out of time and Gunshefski replied that he would not exceed his allotted time. Grogg e-mailed Yeh on September 11, confirming the above conversations, and asking that Gunshefski be charged for a sick day.

On October 6, 2003, Gunshefski did not report for work, and did not call in. Initially Siniscalchi and Grogg thought that Gunshefski had used up all his leave. They checked the

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[150] According to Grogg, prior to the suspension but after Gunshefski again did not show up for work, Gunshefski told management that he was surprised that Respondent was not terminating him. After being told of that he was suspended, Grogg asserts that Gunshefski seemed relieved that he was only being suspended. Gunshefski told Grogg that he thought the suspension was fair and just. Gunshefski did not deny making any of the above comments.

[151] Employees punch in at their computer desk. HR monitors the attendance records. Thus Yeh apparently discovered that Gunshefski had not punched in on July 8.

records and saw that Gunshefski had previously been approved for a vacation day for December 26. Siniscalchi and Grogg decided to switch Gunshefski's vacation day for December 26 to his absence for October 6, so he could be paid for the day.[152] Siniscalchi informed Gunshefski of the action that Respondent had taken, and Gunshefski thanked Siniscalchi for his efforts.

The next day October 7, Gunshefski again did not report for work. He called at 8:45 am and told Siniscalchi that he had a bad back and would not be into work that day. Gunshefski thought he was out of leave. After this conversation, Grogg and Siniscalchi checked the system, and realized that in fact Gunshefski had .5 hours of sick leave and .5 hours of vacation. They decided to allow Gunshefski to use this leave for this absence on October 7. They received approval from HR and notified Gunshefski, by leaving a message on his voice mail.

After Gunshefski returned to work, Siniscalchi and Grogg talked to Gunshefski about how they had handled his attendance problems. Gunshefski replied that he was surprised and most appreciative of the fact that they had handled the absence in that manner.

In October of 2003, e-mails were sent back and forth amongst employees and supervisors, concerning the Yankees and the Mets. Both Siniscalchi and Gunshefski were part of these e-mail messages. At 9:33 am, Gunshefski sent an e-mail to the participants which read, "Yankees Suck!!!" At 9:48 am, Siniscalchi sent an e-mail only to Gunshefski, which read "Please do not use offensive language in this system."

Siniscalchi testified that about a year prior to Gunshefski's discharge, he heard Gunshefski using numerous curse words such as "fuck", "whore", "slut", "fuck him", and he's an "asshole", during a personal conversation on the phone. After Gunshefski completed the call, Siniscalchi asserts that he told Gunshefski that he should not be using such language, this was a professional environment, and that his language was offensive to Siniscalchi and the staff, and was unacceptable. Gunshefski allegedly replied that it would never happen again.

Two to three months later, Siniscalchi testified that, once again he heard Gunshefski using profanity, such as "fuck you", "fuck him" and "who the fuck does he thinK he is?", during another phone call. Siniscalchi claimed that he once more told Gunshefski that this kind of language was unacceptable, and added that if it happens again, it could lead to disciplinary action, up to and including termination. Gunshefski again allegedly replied that it wouldn't happen again.

Siniscalchi conceded that he did not document either of these verbal warnings, because he was a supervisor of Gunshefski and wanted to help him, and thought that by just talking to him, it would not happen again.

Gunshefski testified on rebuttal, that Siniscalchi had never warned him about using curse words in a personal phone conversation. However, Siniscalchi did admit that on one occasion, Siniscalchi had called him on the phone, after he and some other female employees were joking, and some curse words were used. Siniscalchi, according to Gunshefski instructed Gunshefski to "watch the cursing, there are ladies present."

[152] This is contrary to Respondent's normal practice, since sick days and vacation days are normally not interchangeable.

A number of Respondent's witnesses testified that Respondent considers an employee's use of profanity or abusive language to be serious misconduct, that could subject the employee to suspension or discharge, at management's discretion. Chang testified that Respondent will consider the seriousness of the employee's use of profanity and their entire record, in determining the appropriate discipline.

Respondent's Personnel policies effective January 1, 2002, gives Respondent the right to terminate employees at any time in its sole discretion with or without cause. However it also defines "serious misconduct," which includes an immediate suspension and possible termination. One of the items included in that definition is "use of profanity or abusive language." However, in a revision of Respondent's Handbook, effective January 1, 2003, this section was changed. The definition "serious misconduct" was changed to "unacceptable behavior," which can lead to discipline up to and including discharge. Profanity is not included in that list. However, the section states that the list is illustrative only and does not intend to limit Respondent's right to discipline for any reason.

Respondent's witnesses testified that the prohibition on profanity has now been shifted to a new section entitled "HARASSMENT." That section does not mention profanity or cursing, but does prohibit "verbal harassment (epithets , derogatory statements, slurs)".

Michael Kelly was employed by Respondent in the same department as Gunshefski. On June 24, 2003, Kelly was speaking on the phone with Megan Bodell, an employee in Respondent's Salt Lake City office. They were discussing an alleged error that Kelly had made, and Kelly called Bodell a "bitch" and hung up. Shortly after this conversation, Kelly approached Siniscalchi and said that he might be getting a call from Respondent's Salt Lake City office. Kelly added that while discussing an error with Megan Bodell, he had lost his cool, called her a "bitch" and hung up the phone. Siniscalchi recommended that he immediately pick up the phone, call Bodell and apologize to her. Kelly immediately called Bodell and made a sincere apology, in front of Siniscalchi. Siniscalchi told Kelly that his behavior was not professional and was unacceptable, and there may be further repercussions. Siniscalchi did not report the matter to Grogg, or anyone else, and was apparently ready to let it go.

However, Grogg received a call from Cathy Chao, Bodell's supervisor in Salt Lake City on June 26. She reported the incident to Grogg, and asked that action be taken against Kelly. Grogg on June 27 spoke to Siniscalchi about the complaint, and found out that Kelly had reported it to Siniscalchi, and that Kelly at Siniscalchi's suggestion, had apologized to Bodell.

Grogg and Siniscalchi spoke to Kelly, who admitted to his misconduct and stated that he was upset with himself over his behavior. Kelly also advised Grogg that he felt that Bodell had accepted his apology and claimed that Bodell had apologized to him for being somewhat sarcastic and he felt that the matter was resolved. Grogg advised Kelly that there still could be repercussions from the matter.

A document dated June 27, 2003 was prepared by Respondent, entitled Grievance Case, which summarized the above facts and added that if Bodell cares to file a formal grievance, these were statements that were obtained on June 27, 2003. Bodell did file a formal "Employees Grievance" against Kelly complaining about his conduct. This document asks a question "what action the grievant would like Respondent to take?" Bodell answered that question as follows: "ensure this does not happen again."

Once this form was filed, Grogg discussed the matter with HRD. He spoke with Spano and Katy Li. They talked about the problem, and Grogg recommended a two week suspension,

which HRD signed off on. According to Grogg, he recommended a suspension rather than discharge, because it was the first time Kelly had ever engaged in such conduct, and that a two week suspension was an appropriate penalty. Grogg also testified, that although there had been some past problems with Kelly's work, including issuance of prior warnings, concerning errors, he believed that Kelly produced a higher volume of work than other employees in the department. In that regard, Respondent had at that time been able to monitor volume of calls handled by customer service representatives, and according to Grogg, these records showed that Kelly had a higher workload than others in the department. Grogg asserts that he mentioned that fact when discussing his recommendation to HRD that Kelly be suspended, and not discharged.

The warnings that Grogg conceded had been received by Kelly, dealt primarily with errors in bookings, but also mentioned attendance and tardiness. Kelly received a warning note dated September 5, 2001, and October 5, 2001 for tardiness and errors in record keeping. On February 27, 2002, Kelly received another written warning, for substandard work, carelessness, and tardiness. The document referred to previous verbal warnings about carelessness in work performance and excessive errors, and the fact that he was late twice totaling 47 minutes in one week. The notice concludes by stating; "you should bear in mind that unless immediate, profound, and long term improvements are made in terms of your work performance and effort, you will be subject to additional disciplinary measures, up to all including termination."

On January 15, 2003, Kelly received another written warning notice dealing with the same complaints, referring to the February 2002 notice, and stating that although after the warning, his tardiness and work habits showed improvement to a certain degree, he still continued to commit an unacceptable amount of errors and continued to fail to arrive on time. The warning goes on to observe that despite being made aware of these problems, "you continue to fail to demonstrate long-term improvements in those cases. Your substandard work habits and performance are detrimental to the success of the section at this time." The warning concludes by again alerting Kelly that "unless immediate, profound, and lasting improvements are made in terms of all these cases, additional disciplinary measures will be taken up to, and including, termination."

Spano furnished testimony concerning Respondent's termination of other employees, at least in part for using foul language. He testified that prior to reviewing the incident involving Gunshefski, he asked members of his staff to recall prior instances of employees who were disciplined for cursing. They came up with four names, and Spano reviewed the files with respect to these incidents. One was Michael Kelly, which has been discussed above. The other three were Chad Turner, Joanne Capuano and Phillip Chang. According to Spano, Turner was employed by Respondent in Salt Lake City. Sometime in 2003, Turner was involved in an argument with a colleague, and he called her a "wench". At that point another employee confronted Turner, and told him that if he heard Turner talking like that to these women again, "I'll take you outside." As a result, there was some sort of a confrontation between Turner and the other person. Both Turner and the other person were terminated. Joanne Capuano was employed at Respondent's New Jersey office. Spano asserted that she was terminated in 1998. Capuano muttered under her breath, "fuck you, fuck this." The files did not indicate to whom, if anyone these comments were directed, but a supervisor heard the comments. Spano admitted that Capuano also had problems with attitude towards customers or with colleagues, which also contributed to Respondent's decision to discharge her.

Spano also testified about an employee named Phillip Chang, who was employed by Respondent as a sales representative, and was also a nephew of the founder and group chairman of the Respondent, Yung-Fa Chang. According to Spano, Chang was terminated for

a number of issues, including saying under his breath "fuck you, I'll have your fucking job," after a conversation with his supervisor. Spano was not sure if the supervisor whom Chang was meeting with heard Chang's remarks, but he was certain that a supervisor had heard Chang make these comments. Spano added that Respondent had received customer complaints that Chang used foul language in his dealings with them. Spano testified further that neither Turner, Capuano, nor Chang had been suspended, prior to their being terminated.

The testimony of several of Respondent's witnesses is unclear as to whether Respondent utilizes a progressive disciplinary policy. It appears from a compilation of such testimony that Respondent sometimes uses a system of verbal warnings, written warnings, suspension and then discharge, and at other times, it does not. Its personnel handbook does not make any reference to progressive disciplinary requirements, but does refer to the fact that discipline may include verbal and written warnings and suspensions, while making clear that Respondent has the right to determine discipline, and in its sole judgment appropriate discipline in each case, including immediate termination.

Gunshefski testified that Grogg informed him when he was suspended in 2002, that Respondent was starting a new disciplinary policy at that time which required verbal warnings written suspension and then discharge. Gunshefski alleges that he asked Grogg if the system would be used separately for each type of infraction. Gunshefski further asserts that Grogg replied that each different infraction would be separate and would require a new warning and suspension. Thus taking time off would have nothing to do with anything else that Gunshefski might do in the company.

Grogg denied ever having such a discussion with Gunshefski, or informing him about any new disciplinary system at any time. There is no evidence that Respondent instituted a new progressive disciplinary system in 2002. However, as noted above there was a change as of January, 2003 in that the words serious misconduct were changed to unacceptable behavior, and there were changes in the items listed, including removing the "use of profanity and abusive language."

B. Credibility Resolutions and Analysis

Before analyzing the complaint allegation with respect to Gunshefski's discharge, it is essential to make several important credibility resolutions vis á vis the testimony of Gunshefski and several of Respondent's witnesses, particularly Grogg, Siniscalchi and Lou. Based on comparative demeanor considerations, as well as a number of factors described below, I credit the testimony of Respondent's witnesses where it conflicts with the testimony of Gunshefski, and do not credit Gunshefski's version of events, except to the extent that is corroborated by other witnesses. I found that Gunshefski's testimony was unpersuasive, was at times inconsistent with his affidavits, and inconsistent with testimony he had given earlier in the proceeding. For example he gave three different versions of his efforts to solicit cards from employees of Respondent. It was only the last time he testified, on rebuttal, when he suddenly remembered that he had given a card to Ralph Camano. It is significant that his testimony came only after Respondent's witnesses including Lou had testified that they had received a blank card that Camano had turned in to management. I do not credit Gunshefski's testimony that he gave a card to Camano. Indeed, I am skeptical of Gunshefski's testimony in general concerning his union activities. I also reject and do not credit his testimony that he was a member of the organizing committee. That testimony, although corroborated by Levy, whose testimony I also do not credit, was more importantly, contradicted by the fact that numerous documents, introduced into the record, identify members of the organizing committee, and none of them mention Gunshefski's name. Moreover, a number of these named members of the

organizing team, such as Chiang, Chi, Ting and the Magbanua's testified extensively in this proceeding, and none of them mentioned that Gunshefski was a member of the organizing committee. Even Gunshefski's testimony concerning his alleged solicitation of cards from Blake and his brother is suspect, since neither employee although they testified about other matters, corroborated the fact that Gunshefski had given them cards, or indeed that they had any discussion with Gunshefski concerning the Union. I find these omissions highly significant, particularly where his own brother does not corroborate Mike Gunshefski's testimony. It is obvious that Gunshefski was attempting to enlarge his minimal role in union organizing activities, which leads me to an important reason to discredit his testimony that Lou told Gunshefski that Respondent had a list and believed him to be a leading or top union organizer. In fact, he was not a top or leading organizer at all, and as detailed above, his testimony supporting that conclusion is not believable. Since he was not a leading union organizer, I find it unlikely that Respondent would believe that he was, or have any kind of list, that asserts that he was such an organizer. I therefore discredit Gunshefski's testimony in this regard, and instead credit Lou, that Gunshefski brought up the subject, and told him that if the election was held "today," he would vote against the Union.[153]

I also do not credit Gunshefski vis á vis his testimony concerning statements allegedly made to him by Siniscalchi that the Respondent would be closing or moving to North or South Carolina if the Union came in or went through. Gunshefski's testimony as to this alleged statement changed between being made in a one on one conversation to being stated at a meeting of his department. Further, Maria Magbanua was allegedly present at the meeting, and did not corroborate Gunshefski as to this alleged statement of Siniscalchi. I therefore credit Siniscalchi that he did not make the statements attributed to him and that in response to a question by Allison Taylor, merely said that Respondent would not close or fire people if the union won, but that whether there is a union in place or not, if a company is not doing well financially, there is always a possibility that a company may move or close. I note that I have found above, that similar statements, made by other management officials were not unlawful. I find similarly here, and recommend dismissal of complaint allegation that Siniscalchi threatened to close or move the plant in violation of Section 8(a)(1) of the Act.

I also credit Siniscalchi and Grogg on to their version of events on October 28, 2003. Their testimony is mutually corroborative and consistent. The most important areas of conflict between their testimony and that of Gunshefski, consists of whether Grogg told Gunshefski when Grogg notified him of his discharge, that he was being terminated for his entire record, and not just for cursing on that day, as Gunshefski contends. Moreover, during that conversation, both Grogg and Siniscalchi testified that Gunshefski admitted that Siniscalchi had verbally warned him several times for cursing, prior to the date of discharge. I credit Respondent's witnesses as to these conflicts, relying also on Grogg's contemporaneously written memo, which is consistent with his testimony in these areas. I also credit Siniscalchi that he did in fact warn Gunshefski twice about cursing in the workplace prior to October 28, including on the last occasion, telling Gunshefski that if it happens again, it could lead to disciplinary action, up to and including discharge.

In assessing whether Respondent has violated the Act by terminating Gunshefski, it must first be decided if General Counsel has established that Gunshefski's protected conduct, i.e. his union activities, was a motivating factor in Respondent's decision to discharge him. *Wright Line,* 251 NLRB 1083 (1980).

[153] Based on this finding, I recommend dismissal of the complaint allegation that Respondent created the impression of surveillance by Lou's conduct.

I find, particularly in view of my credibility resolutions detailed above, that General Counsel has failed to make such a showing. General Counsel has failed to show that Respondent had knowledge at any time that Gunshefski engaged in any union activities, or was an active union supporter, or indeed that Gunshefski had signed a card for the union. This defect in General Counsel's case is sufficient in and of itself to find that General Counsel has not met its burden of proof. *Music Express East,* 340 NLRB #129 slip op., p. 1-3 (2003); *Central Plumbing Specialties,* 337 NLRB 973, 975 (2002).

Here, I have found that Gunshefski's union activity was minimal. He signed a card, attended a few meetings, and may have distributed some blank cards to a few employees. No credible evidence was presented that any of these activities came to the attention of anyone from management, much less the officials involved in his discharge. I have also discredited Gunshefski's testimony that Lou told him that management had a list which revealed Gunshefski to be a top or leading union organizer. Rather, I have credited the testimony of Lou and Siniscalchi, that in fact, Gunshefski made unsolicited comments to them, indicating that he was not a union supporter.

However, even in the absence of direct evidence of an employer's knowledge of an employees' union activities, such knowledge can be proven by circumstantial evidence. Such circumstances may include the employer's demonstrated knowledge of general union activities, the employer's demonstrated union animus, the timing of the discipline, and the pretextual reasons for the discipline asserted by the employer. *D & F Industries,* 339 NLRB 618, 622 (2003).[154]

With respect to timing, Respondent correctly observes that Gunshefski's discharge occurred on October 28, 2003, 13 months after the election, and 18 months after the union activities, which based on his own testimony were conducted in April of 2002. Thus the discharge was remote in time from Gunshefski's union activity. *Snap-on Tools,* 342 NLRB No. 2 slip op., p. 5 (2004). (Period of two months after election held too remote in time from discharge). General Counsel obviously recognizing this significant deficiency in its case, argues that the element of timing is satisfied by the fact that the instant unfair labor trial was originally scheduled for December of 2003, and Respondent by discharging Gunshefski on October 28, 2003, "was flexing its muscles, letting employees know that no one is safe and that it still holds the employees firmly in its staff." I do not agree.

Initially, as Respondent observes in its reply brief, there was no hearing scheduled for December of 2003, as General Counsel contends. The formal papers reveal that the Region issued a Complaint and Notice of Hearing dated December 31, 2002. A First Amended Complaint was issued on February 14, 2003, as well as a report on Objections in 22-RC-12215. The cases were consolidated, and then postponed to March 18, 2003. The case was then adjourned *sine die,* apparently while Advice was considering the issues of a bargaining order and the 10(j) request. Thus as of October 28, 2003, the date of the discharge, there was no hearing scheduled, although the complaint was still outstanding. Since there was no trial scheduled for December of 2003, as General Counsel contends, no inference is warranted that the imminent pendency of the trial, somehow motivated Respondent to "flex its muscles, and let

[154] It is significant to note Chairman Battista's view, expressed in footnote18 in *D & F Industries*, that knowledge is a separate element of a *prima facie* case, and cannot be shown by animus, timing or pretext. It seems that member Schaumber concurs in this view. See, *Music Express, supra,* where knowledge was not inferred, even though the timing was suspicious, animus was present, and evidence of pretext was present as well.

employees know that no one is safe." Indeed, it was not until November 25, 2003, over a month after the discharge, that a new complaint was issued, setting a hearing date for January 21, 2004. Moreover, I find no evidence in the record establishing any link between the trial (whenever it was to be held) and the discharge. No evidence was adduced connecting the two events, and indeed no evidence was presented of any unfair labor practice committed by Respondent in 2003. All of the violations that I have found above, occurred in 2002, over 10 months from the discharge.

Therefore, the element of timing is sorely lacking in General Counsel's case, and certainly cannot be used to establish the element of knowledge.

Further, the evidence demonstrates that Respondent suspended Gunshefski in November of 2002, a period of time much closer to his union activities. Thus, if Respondent intended to discriminate against Gunshefski in reprisal for his union activities, it had a perfect opportunity to do so in November of 2002, 3 months after the election. Yet, it did not fire him at that time, although he had violated several prior warnings, and once again continued to exhibit poor attendance. Indeed, Gunshefski filed no complaint or charge concerning the suspension, admitted that it was warranted, and in fact informed Respondent that he felt he could have been terminated at the time. Therefore, I find Respondent's conduct towards Gunshefski, in November of 2002, substantially diminishes any possible inference of discriminatory conduct for the termination in October of 2003, which was as noted more remote in time from the union activities of Gunshefski, as well as the election.

Moreover, even in 2003, Respondent had two more opportunities to terminate Gunshefski, and it did not do so, and the same two supervisors who recommended his discharge, went out of their way to help him, and did not discipline him in any way. Thus in July of 2003, Gunshefski failed to report to work and failed to report in sick or on leave. His false claim that there was a computer malfunction was found to be without merit, and Respondent although it could have terminated him for this conduct, merely charged him for sick leave. In early October, Gunshefski failed to report to work and failed to call in once more. Further, it appeared that Gunshefski had used up all his leave, leaving him open to discipline, including discharge, under the express terms of the prior warnings and suspension. However, Grogg and Siniscalchi, rather than terminating Gunshefski, unilaterally switched a vacation day that he had been pre-approved for, to make up for his October absence, and Gunshefski thanked them for their efforts on his behalf. The next day, Gunshefski again did not report to work, called in and thought he was out of leave, and would have to take leave without pay. After Grogg and Siniscalchi checked the system, they found out that Gunshefski had, 5 hours of sick leave and, 5 hours of vacation available. Grogg and Siniscalchi arranged for permission from HR for Gunshefski to use this time for his absence of October 7, contrary to Respondent's normal prohibition against combining both sick leave with other leave.

The above described actions of Siniscalchi and Grogg, are certainly not the actions of supervisors intending to discriminate against Gunshefski. They demonstrate that as testified to by both Siniscalchi and Grogg, that both supervisors bent over backwards to be fair to Gunshefski, and provided him numerous opportunities to improve his performance, rather than terminate him, until the final incident of October 28, 2003.

Accordingly, I conclude that the timing of the discharge, not only cannot be used to support an inference of knowledge, but also that the timing represents in and of itself, a substantial defect in General Counsel's attempt to establish that Gunshefski's union activities was a motivating factor in Respondent's decision to terminate him.

With respect to the other elements from which knowledge can be inferred, it is true that Respondent was aware of general union organizing activities, since an election was held in July of 2002. However, the election, and the union organizing that preceded it occurred well over a year before Gunshefski's termination. Further there was no record evidence of any organizing or any significant union activities in 2003. As of October 2003, as related above the trial was still postponed *sine die,* awaiting Advice's decision on a bargaining order and 10(j) relief. Therefore, Respondent's knowledge of general union organizing activities in the spring of 2002, cannot serve to establish knowledge of any union activities engaged in by Gunshefski.

Similarly, although I have found above, that Respondent committed numerous unfair labor practices during 2002, I have found no such unfair labor practices in 2003, and none were even alleged to have taken place contemporaneous with Gunshefski's discharge. *Snap-on-Tools, supra* at 5.

Further, none of the violations found were directed at Gunshefski, *Snap-on-Tools, supra; Music Express, supra;* and there are no allegations or findings that Respondent took any adverse action against those employees who actively supported the Union. *Music Express, supra.*[155] Therefore, I cannot conclude that the unfair labor practices committed by Respondent in 2002, although quite extensive, are sufficient to draw the inference that Respondent was aware of any union activities of Gunshefski. Nor can these unfair labor practices, for similar reasons be considered significant indications that union animus motivated the discharge. The 8(a)(1) violations found were not directed at Gunshefski, involved wholly unrelated conduct, were remote in time from the termination, and the discharge was directed solely at Gunshefski's subsequent behavior, which was unrelated to any union activity. *Snap-on-tools, supra; Music Express, supra; Central Plumbing, supra.*

I also cannot find, as General Counsel seems to suggest, that the reasons given by Respondent for the termination are pretextual. (i.e. that the reasons given by Respondent either did not exist or were not in fact relied upon.) *Limestone Apparel Co.,* 255 NLRB 722 (1981).

I do find however that the evidence does reveal some suspicious circumstances concerning Respondent's decisions. Notably, the record reveals evidence from a number of employees, that several of Respondent's supervisors, including Grogg, tolerated profanity in the workplace, without even warning or admonishing employees, much less terminating them. *Ferguson Williams, Inc.,* 322 NLRB 695, 704 (1996). Further, Respondent suspended employee Mike Kelly, rather than discharging him, for engaging in more egregious conduct than Gunshefski. Kelly cursed at a fellow employee, which engendered a formal complaint from that employee, as opposed to Gunshefski, who directed his profanity at no one in particular. *Sonoma Mission Inn & Spa,* 322 NLRB 898, 905 (1997).

I note however, that Respondent did offer several explanations for its different treatment of Kelly. These differences include the fact that Gunshefski had been suspended in 2002, and had also received three prior warnings for use of profanity in the workplace, while Kelly had received no prior suspensions, and had never received any warnings for use of profanity. Further, evidence was presented that Kelly was a high producer vis-á-vis volume of calls, which somewhat reduced the severity of his prior record, which included prior warnings for excessive

[155] I note in this regard that the actual members of the organizing committee, who were General Counsel's primary witness in this proceeding, Chiang, Ting, Chi and Magbanua's, suffered no discrimination by Respondent, insofar as this record discloses.

errors.

Finally, Kelly unlike Gunshefski, apologized to Bodell, the person to whom he cursed, and conceded and acknowledged that he had made a mistake, and violated company policy. Gunshefski, on the other hand, did not apologize to the staff members who heard his profanity, and did not acknowledge any wrongdoing, but instead insisted that cursing is common in the workplace. I am not totally convinced by Respondent's purported attempts to distinguish Kelly's case from Gunshefski's. I note particularly that in Kelly's case, Siniscalchi was prepared to let Kelly off the hook, without even informing Grogg, much less recommending discipline based upon Kelly apologizing to Bodell. Similarly, Grogg did not even decide to discuss the issue with HR, until after Bodell filed a written complaint, indicating that he too, would not have taken any action against Kelly, absent such a complaint. This evidence demonstrates that Siniscalchi and Grogg were not as concerned with profanity in Kelly's case, as they were with Gunshefski's.

On the other hand, as Respondent argues, Gunshefski's comments were made out loud, in the workplace, and other employees heard it, and some were visibly upset. Further, Respondent did present evidence that it terminated at least three other employees, including a relative of one of the owners, at least in part for cursing, and in cases where none of these employees had previously been suspended.

Moreover, Respondent also introduced evidence through testimony of numerous supervisors as well as written personnel documents and memos, that profanity in the workplace is considered inappropriate conduct.[156] While evidence with respect to Respondent's use of "progressive discipline," is somewhat unclear, I find that the evidence indicates that sometimes Respondent uses progressive discipline, and sometimes it does not. There is certainly no requirement in the manual that it be used, and as related above, the manual provides for absolute discretion for Respondent to terminate an employee for any reason it deems justified, without any warnings or any prior suspensions. In any event, Gunshefski was in fact subject to progressive discipline. He was given several written warnings, a suspension, and then two verbal warnings for cursing in the workplace, prior to his discharge. His suspension notice in November of 2002 stated at the end, "any further unexcused absences will result in your termination." However, I also note that the prior warning issued on October 4, 2002, stated that Gunshefski must show improvement in attendance and "continued good performance in all areas," or discipline up to including termination could result. Thus this warning clearly would encompass Gunshefski's use of profanity. Further, the evidence reveals that Gunshefski did have "further unexcused absences," in July and early October of 2003, and Respondent did not take any action against Gunshefski. Rather, as related above, Grogg and Siniscalchi went out of their way to help Gunshefski at that time.

This evidence demonstrates that Respondent is not always consistent in its application of progressive discipline, and they frequently threaten further discipline including unlawful termination, but often fail to follow through on such threats. None of these findings establish discrimination by Respondent. It proves only that Respondent issues warnings, notifying the employees that they could be terminated, but giving Respondents supervisor's the right to show compassion for employees, and not discharge them, if they so choose. This is what I find was

[156] I note in this regard that the 2003 personnel manual was revised, to remove profanity from a list of activities considered to be "serious misconduct." However, notwithstanding this change, the remaining provisions of the manual, clearly provides absolute discretion to Respondent to discipline an employee, including termination, for any reason that it deems justified.

the case with Respondent's treatment of Gunshefski. Grogg and Siniscalchi both bent over backwards to help Gunshefski, both in 2002 and in 2003, when they could have easily recommended his termination. Yet they did not do so, until the October 28 incident, when they felt that they could no longer overlook Gunshefski's transgressions, and his continued failure to adhere to Respondent's rules and to improve his performance. Therefore, while as I have found above, there are some suspicious circumstances surrounding the discharge, I cannot find that Gunshefski's termination was pretextual.

I also note that while I might believe that terminating an employee for cursing, where the profanity was not directed at anyone, and where there is evidence that cursing has been tolerated by Respondent, is unfair and unjust, that is not the test for finding a violation. The Board will not substitute its judgment for the employer's as to what constitutes appropriate discipline. *Fresno Bee,* 337 NLRB 1161, 1162, 1185 (2002). The test is whether the employee's termination was motivated by union activities. Here, based on the foregoing, I find that General Counsel has adduced insufficient evidence to support any finding or inference that Respondent either had knowledge of Gunshefski's union activities, harbored antiunion animus towards him, or that any such animus played a role in his discharge. *Central Plumbing, supra* at 974; *Snap-on-Tools, supra; Music Express, supra.*

Accordingly, I conclude that Gunshefski's discharge was not discriminately motivated, and recommend dismissal of this allegation in the complaint.

X. The Request For A Bargaining Order

The Board will issue a bargaining order under the authority of *Gissel*,[157] where the unfair labor practices committed by the employer, have a tendency to undermine the union's majority strength and to impede the election process, and the possibility of erasing the effects of the unlawful conduct and ensuring a fair election are slight, so that the previously expressed employee sentiment is better protected by a bargaining order than by a second election. *Garvey Machine Inc.,* 328 NLRB 991, 993 (1999), *enfd.* 245 F3d 819 (D.C. Cir. 2001); *Cardinal Home Products Inc.,* 338 NLRB 1004, 1010 (2003).

However, the Board has observed, and more recent cases have emphasized, that a bargaining order is an extraordinary remedy, and that the preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. *Hialeah Hospital,* 343 NLRB #52, slip op., p.5 (2004); *High Point Construction,* 342 NLRB #36 slip op., p. 3 (2004); *Aqua Cool,* 332 NLRB 95, 97 (2000).

In determining the propriety of a bargaining order, the Board will examine the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Cardinal Home Products, supra; Garvey Marine, supra; Holly Farms Co., supra.*

I am persuaded that notwithstanding many of the more recent cases of the Board,[158] that the facts here, demonstrate that the possibility of ensuring a fair election is slight, and that

[157] *NLRB v Gissel Packing,* 395 U.S. 575 (1969)

[158] *Hialeah Hospital, supra; High Point Construction, supra; Donaldson Bros.,* 341 NLRB No. 124 slip op., p.1 fn.2 (2004); *Desert Aggregates, supra,* slip op p. 5-6; *McAllister Towing, supra.*

employee sentiment would best be protected by a bargaining order.

As I have detailed above, immediately upon becoming aware of the Union's organizational campaign in mid-April, and continuing through and extending past the election, Respondent embarked on a persvasive campaign of unlawful conduct designed to deter employees from unionizing. *Aldworth Company,* 338 NLRB 137, 148 (2002); *Debbie Reynolds Hotel,* 332 NLRB 966 (2001); *Adam Wholesalers,* 322 NLRB 313 (1996). These violations included interrogations, creating the impression of surveillance, threats to close, threats to reduce benefits, instructions to employees not to attend union meetings or read union literature, solicitation of grievances, promises of benefits, granting of excessive wage increases, and promotions, and various other improvements in benefits, both pre and post election. This unlawful activity was conducted by numerous supervisors, many of them high level, and affected many and in some cases all of the employees in the unit. *St. Francis Hospital,* 263 NLRB 834, 836 (1982), *enfd.* 729 F 2d. 844, 855 (D.C. Cir 1984) (Bargaining unit of 207 employees. Employer granted wage increase, plus interrogations and threats and promises of benefits by eight different supervisors, involving numerous employees).

Here Respondent began its unlawful activity, in early April, when Huang interrogated Yu about her knowledge of the Union and whether she had signed a card. Thereafter, and continuing through the day of the election, 11 different supervisors, (including Huang), committed a total of 13 separate instances of unlawful interrogations involving nine different employees. Additionally, I have found one instance of creation of the impression of surveillance at a meeting, where seven employees were present.

While neither interrogations nor creation of the impression of surveillance represent "hallmark" violations, which the Board and the Courts consider most significant in evaluating bargaining order requests, they have nonetheless been relied upon, in conjunction with other unfair labor practices, to support the issuance of such a bargaining order. *Debbie Reynolds Hotel, supra* at 966; *Aldworth, supra* at149; *Douglas Foods Corp.,* 330 NLRB 821, 822 (2000), *enfd.* denied on other grounds 251 F. 3d 1056 (D.C. Cir. 2001); *L.S.F. Transportation Co.,* 330 NLRB 1054, 1056 1086 (2000), *enfd.* 282 F. 3d 972 (7th Cir. 2002).

I have also found above that Respondent committed numerous unlawful threats, including 11 separate instances of threats to close the plant or loss of jobs, as well as threats to reduce benefits and implied threats of reprisal, plus two instances of unlawful instructions not to read union literature or attend union meetings, and to throw such literature in the garbage. These incidents involved six different supervisors, plus a letter signed by eight supervisors distributed to all employees, that threatened loss of benefits (promotional opportunities), and implied threats of reprisal.

The 11 instances of threats to close or lose jobs are "hallmark" violations, which when present will support the existence of a bargaining order, unless some mitigating circumstance exists. *NLRB v. Jamaica Towing Co.,* 632 F. 2d 208, 212 (2nd Cir. 1980). Both the Board and the Courts have recognized that threats of job loss are among the most flagrant interferences with Section 7 rights and are more likely to destroy election conditions for a lengthier period of time than other unfair labor practices. *Adam Wholesalers, supra* at 314; *Aldworth, supra,* at 149; *Debbie Reynolds, supra* at 967; *Overnite Transportation, supra* at 993; *Koon's Ford of Annapolis,* 282 NLRB 506, 508 (1986), *enfd.* 833 F. 2d 310 (4th Cir. 1987); *Long Airdoux,* 277 NLRB 1157, 1160 (1985); *Bi-Lo. Foods,* 303 NLRB 749, 771 (1991), *enfd.* 985 F. 2d 123, 127 (4th Cir. 1992).

I note that the 11 instances of unlawful threats to close or of job loss affected approximately 27 employees,[159] and were made by six different supervisors, including several instances of unlawful threats to close by Raymond Lin, Respondents Executive Vice President, who is a high level supervisor, on a level in Respondent's hierarchy directly under President Thomas Chen. The involvement of high level supervisors in such comments compounds the severity of the misconduct. *Overnite Transportation, supra* at 992. It serves to strengthen and amplify in the minds of employees the seriousness of the unfair labor practices. *Adam Wholesalers, supra* at 314. When the anti union message is so clearly communicated by the words of the highest levels of management, it is highly coercive and unlikely to be forgotten. *Consec Security*, 325 NLRB 453, 454-455 (1998) *enfd.* mem. 185 F. 3d 862 (3d Cir. 1999); *Overnite Transportation, supra* at 992-993; *Electra Voice,* 320 NLRB 1094, 1096 (1996); *Adam Wholesalers, supra* at 314; Long Airdoux*, supra* at 1160; *Midland Ross Co. v. NLRB,* 607 F.2d 977, 987 (3rd Cir 1980).

I also rely upon the unlawful instructions made by Raymond Lin, to employees not to attend union meetings, to read union literature, and to throw it away in the garbage, which was made by Lin to a number of employees at two separate meetings. While these comments may not represent "hallmark violations," they are nonetheless coercive, and significant, since they were uttered by Lin, a high level official to employees.

Further, I also rely upon the letter signed by eight supervisors and distributed to employees, which unlawfully threatened loss of benefits (change in promotion opportunities) and contained an implied threat of reprisal. (Respondent would "change forever for the worse" if the union came in.) The signers included Vice Presidents such as Dan Grogg, Jay Buckley, Charles Yeh, and Eddie Lou who are Junior Vice Presidents, relatively high level positions, and was also distributed to all employees in the unit.

I have also found above that Respondent committed numerous violations of unlawfully soliciting of grievances with an implied promise of benefit, as well as several instances of unlawful promises benefit. I have found seventeen instances of unlawful solicitation of grievances, and unlawful promises of benefit. These violations affected virtually every employee in the unit, since some of the violations were committed by Thomas Chen in his speeches to employees. In addition to Chen, other high level supervisors who committed these violations included Dan Grogg, and Executive Vice President's Jimmy Kuo, Y.T. Lin and Raymond Lin,[160] as well as Capt. Kuo, from Taiwan. Indeed the record demonstrates and I find, that Respondent engaged in an intensive, well orchestrated campaign, utilizing not only high level supervisors as described above, but also supervisors from other locations such as Charles Chen and Albert Shiu who are the heads of Respondent's Salt Lake City and Charleston offices, and are also Senior Vice Presidents of Respondent.

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[159] Eleven employees who testified about hearing the threats, twelve other employees who were present when Lin threatened job loss at a meeting of the Accounting department, two other employees present when Lin made a threat to close at the Finance Department meeting, and two other employees present, along with Huang, when Yen and Tung made two separate threats to close. Further the record discloses that Yu disseminated Lin's threat to close to two other employees who were not at the Finance Department meeting.

[160] As noted above, the position of Executive Vice President is immediately below Chen in Respondent's hierarchy. E.V.P.'s are consulted by Chen with regard to major decisions, such as wage increases and promotions.

While neither solicitation of grievances nor promise of benefits are "hallmark violations", they are nonetheless considered significant in evaluating the propriety of a bargaining order, particularly, where as here, they are so pervasive, and are accompanied by evidence that at least some of the benefits solicited from employees and promised by Respondent, have been granted. I note particularly *International Harvester Co.,*179 NLRB 753 (1961), one of the first bargaining order cases the Board decided, post *Gissel*. The Board issued a bargaining order therein, where the only violations alleged and found were interrogations, solicitation of grievances and the minor grant of benefits, which involved fixing of the defective equipment that employees had mentioned when the unlawful solicitation of grievances were committed. The Board observed:

> We are satisfied that a bargaining order is warranted on the facts in this case under the latter standard of *Gissel.* Thus, the Respondent, upon being confronted with the Union's demand for recognition, which was clearly supportable, embarked upon a deliberate campaign to undermine the Union's majority status. The Respondent utilized the forum of an assembled meeting of the store employees to interrogate the employees, and, subsequently, ascertained their complaints and grievances, which were of long-standing duration, and immediately corrected them, in violation of Section 8(a)(1) of the Act. These unfair labor practices, which, although perhaps not extensive in number, nor heinous in character, nevertheless were deliberately and calculatedly designed to interfere with the employees' designation of their bargaining representative. There are few unfair labor practices so effective in cooling employees' enthusiasm for a union than the prompt remedy of the grievances which prompted the employees' union interest in the first place. Under such circumstances, Respondent's unlawful conduct tended to undermine the Union's majority and impede the election process, and thus the possibility of erasing the effects of the past unfair labor practices and of ensuring a free election by the use of traditional remedies is slight. We therefore find, on balance, that the employees' sentiment, expressed through the membership applications and the paid initiation fees, is a more reliable measure of employee desires, and that statutory policies are better effectuated by issuing a bargaining order in this case. Accordingly, we shall reaffirm the unfair labor practice findings and the remedy provided therefore in the original Decision and Order herein. *Id.* at 753-754.

Subsequent to *International Harvester, supra,* the Board supported by the Court's, have continued to follow that rationale, and rely heavily on the unlawful solicitation of grievances, at times, even without an accompanying grant of benefits, to support issuance of a bargaining order. Thus in *Teledyne Dental Products,* 210 NLRB 1346 (1974), the Employer unlawfully solicited grievances from employees, promised to implement the suggestions, and implemented one minor demand concerning coffee breaks. The Board reversing an ALJ, who had refused to issue a bargaining order, reasoned as follows:

> In essence, we are presented with a situation wherein the Respondent has deliberately embarked upon a course of action designed to convince the employees that their demands will be

> met through direct dealing with Respondent and that union representation could in no way be advantageous to them. Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence. We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain. Neither is there any conduct which could constitute a greater impairment of employees' basic Section 7 rights under our Act, especially since such conduct by its very nature has a long-lasting, if not permanent, effect on the employee's freedom of choice in selecting or rejecting a bargaining representative. Accordingly, we find, contrary to the Administrative Law Judge, that the issuance of a bargaining order would be both a necessary and proper remedy for the unlawful conduct found herein. *Id.* at 1346–1347.

This reasoning was followed in *Astro Printing Services,* 300 NLRB 1026, 1029 (1990), where the Employer solicited grievances, promised to implement them, but failed to implement any of its promises. The Board citing *Teledyne, supra,* found a bargaining order warranted, since the Employer had taken action to "solicit the grievances underlying their desire for representation, and to impress on the employees that their demands could be best fulfilled, through direct dealing with the Respondent and that union representation would not offer them any advantages." *Id.* at 1024. Other cases supporting this rationale for bargaining orders include *Bookland, Inc.,* 221 NLRB 35, 40 (1975); *NLRB v. Eagle Material Handling*, 558 F 2d. 160 (3rd Cir. 1977); *Holly Farms, supra* at 281. (Bd. observes that "the solicitation of grievances and promises to remedy them and the grant of wage increases have a strong coercive effect on employee free choice because they eliminate primary reasons for organization.) *Montgomery Ward & Co.,* 288 NLRB 126, 129 (1981), *enf.* denied on other grounds 904 F. 2d 1156 (7th Cir. 1990).

Here Respondent has done precisely what this precedent forbids. Respondent embarked on an extensive campaign to discover what grievances its employees had that led them to consider unionization, impliedly and expressly promised to remedy them, and in fact did remedy a number of the suggestions made by employees, some before and some after the election. These benefits included changing Respondent's casual dress policy, flextime for lateness, inviting family members to Respondent's Holiday party, as well as the granting of a wage increase and increased promotions, all of which were mentioned by employees to Respondent during its solicitation of grievances. The fact that some of these benefits were granted after the election, does not as Respondent appears to contend, make them irrelevant to consideration of the bargaining order. While these benefits cannot be used to set aside the election, they are not only relevant to the bargaining order issue, but are in fact significant evidence supporting the issuance of such a remedy. Such post election action demonstrates Respondent's continuing propensity to violate the Act and indicate that the coercive effects of Respondent's unlawful conduct are likely to linger, making it highly unlikely that a free fair election can be held. *Adam Wholesalers, supra* at 314; *Aldworth, supra* at 1150, *Long Airdoux, supra* at 1160; See also, *Raley's,* 236 NLRB 971, 973 (1978) *enfd* 608 F. 2d 1374 (9th Cir. 1979). (Board finds post election increases served the double purpose of fulfilling its implied promise of benefits, as well as rewarding employees for their rejection of the Union, and justifying a bargaining order.)

Respondent's campaign strategy is exemplified by Thomas Chen's own words in his speeches to employees on May 23 and July 16. On May 23, he solicited grievances from employees by encouraging them to express their views on "how we can make this company a better place to work," asked for "recommendations for improvement," and told the employees that "our mutual concerns can best be addressed directly and without intermediaries who are strangers to the company." Chen followed this speech with similar remarks on July 16, which was subsequent to the extensive campaign by numerous supervisors, including high level officials to speak to employees and ascertain their suggestion for changes. On July 16 he requested that employees give Respondent a chance to do better in the future, to give it one year "to address your concerns. If you are not satisfied by the end of that year, you have the option to make this decision again." He also during that speech stated, "if EGA does not make the effort to deal with our employees' concerns now, we are simply giving renewed opportunities for the unions to come into our workplace." Moreover, immediately after the election was over and the employees had voted against the Union, Chen gave another speech, thanked employees for their support, and pledged to work with employees to "address the issues you helped bring to our attention." Finally, Chen announced at a management meeting on 7/31 that the employees had "made a wise decision to give management the opportunity to improve. The company takes the opportunity seriously." These comments by Chen make crystal clear Respondent's message to employees, that they do not need a union to address their concerns, but management will do so, without union intervention. This message was reinforced by Respondent's actions in granting benefits to employees, both before and after the election, which makes the possibility of a free and fair election highly unlikely.

The most significant of the benefits granted by Respondent, is of course the unprecedented, substantial across the board wage increase. As related above, this increase of $400.00 per month for all employees represented, for 93% of the unit an increase of more than the employees received for the last three years of raises combined. Further, it was unlike prior increases entirely across the board, without any deviations based on merit. This is particularly significant, since some employees were expecting little or no increases, because they had received poor evaluations. Notably, in 2001, the last time raises were given to employees, 18 employees received no increase at all, based on their low evaluation scores.

There is little doubt that most union contracts provide for across the board increases for employees, without any provisions for merit increases, based on evaluations. Indeed Respondent's contract with the ILA in Los Angeles so provides. I therefore find the across the board aspect of the raise to be particularly significant in supporting the conclusion that the wage increase here make the chances of a free election remote, if not impossible.

Wage increases, particularly, where as here, the increases are given to all unit employees, is clearly a "hallmark violation", and has long been held to be a substantial indication that a bargaining order is appropriate. Indeed there are several Board cases, affirmed by the Courts, which concluded that a bargaining order is warranted, where the sole violation found was a wage increase granted to the bargaining unit. *Honolulu Sporting Goods Co.,* 239 NLRB 1277, 1280 (1977), *enfd.* 620 F.2d 310 (9th Cir. 1980); *Skaggs Drug Centers,* 197 NLRB 1240, 1241 (1972), *enfd.* 84 LRRM 2384 (9th Cir. 1973); *Tower Records,* 182 NLRB 382, 387 (1970), *enfd.* mem. 79 LRRM 2736 (9th Cir.1972).

Further, the cases are legion in finding that a wage increase is the most significant violation supporting a bargaining order, frequently where it is the only "hallmark violation" found. *Overnite Transportation, supra* (Granting unprecedented wage increase, threats of job loss,

promises of benefit, threats of loss of benefits, soliciting grievances, failing to observe *Johnnie's Poultry*,[161] standards); *Holly Farms,* supra, (Granting wage increase, interrogations, solicitation of grievances); *Triec Inc.,* 300 NLRB 743, 751 (1990) (Wage increase, threats of loss of work, interrogation, promises of benefits); *Pembrook Management,* 296 NLRB 1226, 1227-1228 (1989) (Substantial wage increases, bonuses, interrogations, threats of loss of comptime, ordering employees not to wear union insignia); *Color Tech Co.,* 286 NLRB 476, 477 (1987) (Wage increase, solicitation of grievances, promotions and supporting an employee letter repudiating the union); *St. Francis Hospital, supra* (Wage increase, interrogations, promises of benefits and threats of reprisals); *J. J. Newberry Co.,* 249 NLRB 991 (1980) *enfd.* denied 645 F. 2d 148, 153 (2nd Cir. 1981) (Wage increase, interrogations, solicitation of grievances); *Anchorage Times Publishing,* 237 NLRB 544, 562 (1978), *enfd.* 637 F. 2d 1859, 1369-1370 (9th Cir. 1981) (Wage increase, interrogations, surveillance, creating impression of surveillance, threats of job loss); *Elmwood Nursing Home,* 238 NLRB 346, 350 (1978) (Wage increase, interrogation, threats of job loss, creating impression of surveillance); *Bookland Inc.,* 221 NLRB 35, 39-40 (1975) (Substantial wage increase, solicitation of grievances); *NLRB v. Eagle Material Handling,* 588 F. 2d 160, 166-168 (3rd Cir. 1975) (Wage increase, solicitation of grievances, threat to outsource work, and discharge of a supervisor to induce employees to vote against union); *WKRG-TV,* 190 NLRB 172, 173 (1971), *enfd.* 470 F2d 1307, 1318-1320, (5th Cir. 1973) (Wage increase, promise of benefits, maintaining and enforcing an unlawful no solicitation rule and solicitation of grievances, interrogations). See also, *Scott v. Dunn,* 241 F. 3d 652, 664-665 (3rd Cir. 2001) (Court of Appeals reverses District Court's refusal to grant 10(j) relief, based primarily on wage increases, along with installation of new equipment. Court observes that wage increase is as highly coercive in its effect as discharges or threats of business failure.)

Furthermore, other cases have also relied upon unlawful wage increases, as simply one of a number of unfair labor practices, including unlawful discharges to support bargaining orders. *Parts Depot,* 332 NLRB 670, 674-677 (2000) (Wage increase, layoff of most prominent union supporter, promise and grant of benefits, threats of reprisals, unlawful promotions, solicitation of grievances, coercive instructing employees to refrain from supporting union); *Adam Wholesalers, supra*, 322 NLRB 313, 314 (Wage increases, incentive Bonus plan, threats of job loss, unlawful discharges of two employees, interrogations, threats not to promote, creating impression of surveillance); *Flexsteel Industries,* 316 NLRB 745, 746-47 (1995) (Wage increases, discharges of 3 employees, solicitation of grievances, interrogations threats to close); *Capital EMI Music,* 311 NLRB 997, fn. 4, 1017-1018 (1993) (Wage increase, threats of discharge, not to hire, futility and loss of benefits, interrogations, solicitation of grievances, discharge of one employee.)

The rationale for emphasizing the importance of wage increases in assessing bargaining orders is detailed in a number of the above cited precedents, "Unlawful wage increases have a particularly long lasting effect because the Board's traditional remedies do not require that an employer rescind its wage increase. Because such increases appear in employees pay checks, they are a continuing reminder that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged." Quoting, *NLRB v. Exchange Parts,* 375 U.S. 405, 404, (1969). *Overnite Transportation, supra* at 992; *Parts Depot, supra* at 675; *Adam Wholesalers, supra* at 314; *Flexsteel, supra* at 740; *Holly Farms, supra* 282; *Capital EMI, supra* at 1018; *Triec, supra* at 751; *Color Tech , supra at 477; St. Francis v. NLRB, supra* 729 F.2 at 855; *NLRB v. Anchorage Times, supra* 637 F.2d at 1370; *Scott V. Dunn, supra* 241 F.2d at 666. Also apt is a much quoted statement[162] from the ALJ,

[161] 196 NLRB 770 (1964), *enf.* denied 344 F.2 617 (8th Cir. 1965).

[162] See for example *Pembrook, supra* at 1228; and *Honolulu Sporting Goods, supra* at 1282.

affirmed by the Board as in *Tower Records, supra.*

> It is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on hope that such representative may be successful in negotiating wage increases. Certainly this appears to have been an important consideration in the instant case. A unilateral award of a wage increase by an employer following a union's demand for recognition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interests, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When as here, an employer does so, free choice in a subsequent election becomes a matter of speculation, so long as the effects of the interference remain unremedied. 182 NLRB at 387.

Finally, in my view, a quotation from the 5th Circuits opinion in *NLRB v. WKRG-TV,* is particularly applicable here:

> Prior to any employer interference, the majority of unit employees expressed a desire to be represented by the union…. Certainly, the massive, calculated granting of benefits, undertaken by the company to counter the organizational drive must have had the foreseeable effect of removing the union's raison d'etre in the eyes of many of the employees. Unless it can be said that the present constituency of the company is capable of a real freedom of choice, the card majority should not be subordinated to a potentially tainted election. On this record, which indicated that the rationale of the union was destroyed through belated benefit-granting and the organizational effort was retarded by unfair labor practices, to say that the Board erred in holing that a fair election could not be held would hardly do justice to the values of free choice that *Gissel* seeks to protect. 470 F. 2d at 1314, 1320.

I also note that the wage increases were not the only unlawful benefits granted by Respondent. It also promoted an excessive number of employees. I have found that of the 20 promotions granted on 7/1/02, from 10-13 were unlawful. Unlawful promotions have also been held to be "hallmark" violations. *Cardinal Home Products, supra* 338 NLRB at 1010 and has been held to be supportive of the issuance of a bargaining order. *Parts Depot, supra* at 6705. I find similarly here. I recognize that in *Cardinal Home, supra,* the Board although recognizing that the promotion of temporary employees to permanent status was a "hallmark" violation, relied on the lack of dissemination of the promotions to other employees, to conclude that this violation, (along with the discharge of one employee), did not justify a bargaining order. *Id.* at 1010-1011. However, here unlike *Cardinal Home, supra,* there is evidence of dissemination of the promotions. Several employees testified that they were aware of the large number of promotions granted by Respondent in 2002, particularly among members of the particular department where the employees worked. Furthermore, Supervisor Eddie Lou

testified that Respondent sends out e-mails announcing the names of those promoted.

In any event, even assuming that the evidence of dissemination is insufficient, *Cardinal Home Products,* is clearly distinguishable. That case relied on the fact that none of the unfair labor practices found, (threats of discipline, interrogations, discharge of two employees, and unlawful promotions) affected the entire unit, and in such circumstances they are not likely to have long lasting affect that traditional remedies would be inadequate to ensure a fair election. The Board also noted, that even apart from the dissemination issue, there was no evidence of threats of plant closure or discharge, among the unfair labor practices found, and relied heavily upon the absence of such evidence, to conclude that a bargaining order is not warranted. *Id.* at 1011.

Here, in contrast, there is evidence of unlawful threats of closure, and job loss, which were made to a substantial number of employees by a number of supervisors including high level officials. Further, Respondent granted an unlawful wage increase which affected every employee in the unit, as well as granting several other benefits to the entire unit, both before and after the election.

I find it therefore appropriate to rely upon the excessive number of promotions granted by Respondent as another "hallmark" violation and strongly supportive of the conclusion that a bargaining order is appropriate.

Finally, I also rely upon the various other benefits granted by Respondent, both before and after the election. They included liberalizing its attendance policy, by permitting flextime, and allowing employees to make up 10 minutes of lateness, posting of job openings on the EBB, casual dress, improving sick leave benefits, changing holidays by allowing employees to switch Good Friday for Martin Luther King day, changing the age for participants in its Voluntary Separation Program, issuing a $400.00 gift card to all employees at Christmas, and allowing guests at the year end Holiday party. There is some question whether any or all of these benefits should be characterized as "hallmark violations," like wage increases and promotions. In *Jamaica Towing, supra,* the seminal case defining "hallmark violations," it mentions grant of "benefits," without any further breakdown of the term, as a "hallmark violation." Subsequent cases have continued to refer to benefits other than wage increases as "hallmark violation." *Gerig's Dump Trucking,* 320 NLRB 1017, 1018, 1026-1027 (1996) (Grant of employer paid medical and disability insurance); *Stanley Feil Inc.,* 250 NLRB 1154, 1980 (Grant of Medical Benefits); *Texaco Inc.,* 178 NLRB 434, 435 (1964), *enfd.*, 436 F. 2d 520, 524, 525 (7th Cir. 1971) (although not using the term "hallmark violation," bargaining order issued based on employer soliciting grievances and granting benefits of paying overdue debts and repairing tractor trailer); *Tipton Electric Co.,* 242 NLRB 202, 203 (1979) *enfd.* 621 F. 2d 890, 898-899 (8th Cir. 1980) (Change in Employee's draw and payback policies.)

However in *Burlington Times,* 328 NLRB 750, (1999), the Board considered the issuance of a bargaining order in a case where the Employer had unlawfully granted benefits by rescinding an unpopular mileage reimbursement system, and terminating a supervisor. The Board, reversing an ALJ, found that the grants therein were not "economic" benefits, such as wage increases, and unlike wage increases, which serve a continuing reminder to employees by virtue of a weekly paycheck, that these benefits, are unlikely to have such an enduring effect on election conditions. This it appears that benefits which are economic in nature are considered "hallmark violations," and take on added significance in assessing the propriety of a bargaining order. Here, I need not decide whether these benefits, aside from the wage

increases and promotions are considered "hallmark violations", to conclude, which I do that they are supportive of the issuance of a bargaining order.[163]

Thus here, unlike *Burlington Times, supra,* there is an unlawful wage increase, as well as unlawful promotions, which as *Burlington Times, supra* conceded, "have potential long lasting effect not only because of their significance to employees, but also because the increases regularly appear in paychecks as a continuing reminder." *Id.* at 753, citing *Holly Farms, supra.*

I therefore find it appropriate to rely upon these additional benefits granted by Respondent, as further support for my conclusion that a free and fair election is unlikely.

The Board's quotation in *Tipton Electric,* 242 NLRB 202, 203 (1979), *enfd.* 62 F2d 897, 899 (8th Cir. 1980), is particularly pertinent here:

> Here, the Respondent's post-election grant of benefits rewarded employees for rejecting a union which the Respondent had earlier portrayed as a divisive force which would destroy harmonious working relationships. It was a calculated application of the carrot and the stick to condition employee response to any union organizing effort, and it affords the Respondents an unlawfully acquired advantage in regard to a rerun election which cannot be cured by simply ordering them to mend their ways in the future and post a notice. *Id.* at 202-203.

I therefore conclude based on the precedent cited above, that the possibilities of a free and fair election are unlikely, and a bargaining order is appropriate.

In reaching this conclusion, I recognize and have considered the fact that the Board in several recent cases, has refused to grant bargaining orders, and in some cases, where unlawful wage increases have been found. *Hialeah Hospital,* supra, (Discharge of leading union adherent in a small unit, threats of discharge, and surveillance); *High Point Construction, supra* (Interrogation, threats of loss of work and shutdown, surveillance); *McAllister Towing,* supra, (Unlawful wage increase, unlawful grant of 401(K) benefits and five holidays); *Donaldson Bros., supra* (Interrogation, laying off of one employee, and unlawful wage increase); *Yoshi's Restaurant, supra* (Threats of plant closure to three employees, no evidence of dissemination, wage increases, bonus, shift interrogations, solicitation of grievances); *Aqua Cool,* 332 NLRB 95, 97 (2000) (Threat of plant closure to one employee, solicitation of grievances, promises of benefit, threats of loss of benefits, promises of benefits.) While these cases establish that the Board has recently tightened up considerably in its issuance of bargaining orders, they do not preclude bargaining orders where appropriate. In my view, an examination of the facts and analysis of these and other cases cited by Respondent does not persuade me that my analysis, supported by the massive precedent that I have detailed above, of the Board and the Courts, should be changed. The cases cited by Respondent are all distinguishable in significant

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[163] I would note however that a number of these benefits have economic components. Thus the $400.00 gift certificate is clearly economic, and is in the nature of a bonus. Further the change in age date for the Voluntary Separation Program clearly has economic implications, for those eligible to participate, and even the changes in sick leave policy of permitting employees to carryover time or to use a day for spouses or children's illness, could in some circumstances have economic consequences to employees.

respects from the instant case, and in fact the language in several of these cases support my conclusion.

The most important and significant case cited by Respondent is *McAllister Towing, supra,* which is closer to the facts here than any of the other cases relied upon by Respondent. There, the Employer granted an unlawful wage increase, as well as two other economic benefits, a 401(K) extension, and five additional holidays, The ALJ, citing many of the cases that I have relied upon, such as *Holly Farms, supra; Tower Enterprises, supra; Honolulu Sporting Goods, supra;* and *Overnite Transportation, supra,* concluded that a bargaining order was warranted, due to these violations. The Board reversed the ALJ as to this conclusion. While the Board recognized and reaffirmed the ALJ's conclusion, that wage increases generally have a lasting impact on employees, since they appear regularly in employees paychecks, it concluded that this finding was not applicable to the facts therein. Thus the Board relied on the fact that the ALJ did not find the increase itself unlawful, but only the timing. She concluded that only the timing was unlawful since she credited the Employer's testimony that Respondent would have granted the increase anyway, but concluded that it moved up the increase by over a month to coincide with the election. Therefore the Board found that by July, (a month after the unlawful increase) the employees would have been receiving the adjustment in any event.

That finding cannot be made here, since the unlawful excessive, across the board increase is unlawful, and not merely unlawful, based on timing. Thus employees will be likely to remember each time they look at their paychecks, and see large across the board increases,[164] that "the source of benefits so conferred is also the source from which future benefits must flow and which may dry up if not obliged." *Exchange Parts, supra.*

Moreover, in *McAllister Towing,* the Board observed that the Employer did not engage in "hallmark violations" such as discharges or threats of job losses or plant closing. Here, as I have related, there is evidence of threats of plant closure, and job loss, committed by several supervisors, including high level officials, and affecting substantial numbers of employees in the unit. The Board in *McAllister Towing,* also observed that "this is a close case," while distinguishing prior cases as related above. These comments suggest that had there been threats to close and or an unlawful wage increase, not based on timing alone, that a bargaining order would have been warranted. I so find. I concede that the instant case may be a "close case," as well, but in my view the facts fall on the other side of the line. In that regard, I note that in *McAllister Towing,* there were no other unfair labor practices other than the grants of benefits.

In contrast, here I have found numerous other unfair labor practices, such as the aforementioned threats to close, threats to withdraw benefits, interrogations, creating the impression of surveillance, solicitation of grievances and promises of benefits. These violations are particularly significant in view of the extensive campaign of solicitation of grievances by Respondent before the election. They demonstrate that Respondent would fulfill its implicitly made repeated promise during the campaign, by numerous supervisors including President Chen, to rectify employee concerns, if they give Respondent another chance, and vote against the Union. As the Board observed *Raley's, supra,* the granting of benefits by Respondent, was "in fulfillment of the implied promise of benefit made at the meetings as well as rewarding employees for their rejection of the Union." The Board further observed in authorizing a bargaining order, based solely on such conduct, that the Respondent had "attempted to

[164] I emphasize again the importance of the across the board nature of the increases here, which is contrary to past practice. This is another factor not present in *McAllister Towing, supra.*

extirpate the source of the employees' interest in collective representation." Thus the Board concluded that the "effects of such misconduct would carry over into a new election and improperly affect the results." *Id.* at 973.

In sum, I find here that the granting of Respondent's post election benefits, coupled with the pre election benefits of the unlawful wage increase and excessive grants of promotions, are likely to have a long lasting effect on employees, and "will serve as a reminder to the employees that the Respondent, and not the Union, is the source of such benefits and that they may continue as long as the employees do not support the Union." *Gerig's Dump Trucking, supra* at 11017-1014; *Parts Depot, supra,* at 675.

I therefore based on the foregoing find *McAllister Towing,* not only distinguishable from the instant case, but actually supportive of the granting of a bargaining order here, since the Board recognized the significance of unlawful benefits in issuing such orders, and specified that *McAllister Towing* was a close case. Since here there were significantly more unfair labor practices that in *McAllister Towing,* I conclude that *McAllister Towing* is actually consistent with my finding that a bargaining order is appropriate. I also have considered *G. H. Bass Caribbean,* 306 NLRB 823, 828 (1992), which was cited in *McAllister Towing* as support for refusing to issue a bargaining order, despite an unlawful across the board increase, plus a dental plan. However that case is clearly inapposite. There the election was a decertification election, and the first election was set aside by agreement of the parties. A second election was held and objections were again filed. While these objections were pending Respondent unilaterally granted an across the board increase and a dental plan. The ALJ and the Board found 8(a)(5) violations based on unilateral changes made while objections were still pending. *W. A. Krueger Co.,* 299 NLRB 914 (1990). The ALJ and the Board dismissed the objections filed by the Union, and certified the results of the election. The union argued that the bargaining order was appropriate, in view of the unfair labor practices found. The ALJ refused to grant the request, finding simply that the remedy of cease and desist from unilaterally granting increases and benefits prior to resolution of a *qcr* of any incumbent union is sufficient to remedy the violations found. The Board agreed, without any discussion. This case is clearly not even close to the instant matter. The only violations found were unilateral changes by the Employer, found to be unlawful, only because objections were pending, and not because, as here, the benefits were granted to discourage support for the Union. Further, and more importantly, the Board certified the results of the election, which the Union lost, thereby eliminating its majority status. Thus no bargaining order could issue, since the union had lost its majority status, prior to the commission of any of the unfair labor practices found. Therefore, *G.H. Bass, supra,* is clearly not in point, and in my view, I find it hard to understand why the Board even cited it in *McAllister Towing.*

The other case cited in *McAllister Towing* is *Yoshi's Restaurant, supra,* which is also cited by Respondent. The Board characterized *Yoshi's Restaurant* as a case "involving comparable and even slightly more egregious violations," than in *McAllister Towing,* citing unlawful wage increases to union activists, interrogations, solicitation of grievances, and threats of plant closure, present in *Yoshi's Restaurant.* The ALJ in *Yoshi's Restaurant* despite finding the above violations, refused to recommend a bargaining order. She concluded that although the threats to close were made to three employees, they were not transmitted to other employees.[165] Here, in contrast, the threats to close involved 27 employees, and there was evidence of dissemination to other employees.

[165] She also found that an implied threat of closure made at a meeting was not a "hallmark violation."

The ALJ then recognized the significance of wage increases in assessing bargaining orders, since they are not required to be withdrawn, and their effect will continue to be felt. However, the ALJ found that Respondent acted under a "misunderstanding of the law," rather than outright animosity to the union. Therefore, she concluded that the chances of a fair election was "more than slight," and a bargaining order was not warranted. *Id.* at 1346. The Board agreed with the ALJ that a bargaining order was not warranted. However it disagreed with most of her rationale. The Board disavowed her assertion that the alleged "misunderstanding of the law" by the Employer should be considered, since ignorance of the law is not a defense, and does not mitigate the "discriminatory impact of the wage and benefit increases on its employees." Further, the Board specifically disagreed with the ALJ's statement that an implied threat to the employees is not a "hallmark violation." Nonetheless, the Board without any further explication or analysis agreed that General Counsel had not shown that the Board's traditional remedies would be inadequate to mitigate the effects of the unfair labor practices found and make holding of a second election possible.

Again, an analysis of the facts in *Yoshi's Restaurant* reveals significant differences from the instant case. In addition to the more widespread threats to close detailed above, Respondent here also engaged in a much more extensive campaign of interrogations, solicitation of grievances, promises of benefit and creating the impression of surveillance, as detailed above, than did the Employer in *Yoshi's Restaurant*. Further, Respondent here, unlike the Employer in *Yoshi's Restaurant*, granted a number of other benefits in addition to the wage increase, including another "hallmark violation" of excessive promotions, and many of these benefits were granted after the election. As I have observed above, the post election unfair practices are most significant in supporting the issuance of bargaining orders. *Parts Depot, supra,* and cases cited therein.

Finally, and perhaps most importantly, the wage increases granted in *Yoshi's Restaurant* were to a small percentage of bargaining unit employees,[166] albeit primarily to union activists. Therefore the majority of employees in the unit were not affected by these increases, and it is not reasonable to conclude, that when the employees look at their paychecks, they would be likely to serve as a continuing reminder to these workers about the source of their benefits. Accordingly, I do not find *Yoshi's Restaurant, supra,* to be dispositive precedent.

Similarly, *Donaldson Bros, supra,* I also find to be distinguishable. In that case the ALJ found a number of violations, some of which were reversed by the Board. The Board also found some violations not found by the Judge. The ALJ refused to recommend a bargaining order, since he concluded there was only one "hallmark violation" that of an unlawful across the board increase of 50 cents per hour, per employee. The ALJ concluded that Respondent's misconduct was "tightly confined" to a brief six week period, between April 3 and May 19, and there was no "evidence" that a future election would be impeded, noting that only one employee had testified about changing his mind about the union.

The Board affirmed the ALJ's conclusion that no bargaining order was warranted, without any discussion other than saying, "we agree with the Judge that the Respondent's unfair labor practices do not warrant the imposition of a bargaining order." An examination of the facts and reasoning of the ALJ, again reveals significant distinctions between that case and the facts herein.

[166] The Decision revealed that of 35 unit wait staff employees, only 6 received increases.

The ALJ pointed out that there was only one "hallmark violation" in *Donaldson Bros.,* while here as noted there were three. (Threats to close, wage increase and excessive promotions). Further as to the wage increase, the facts reveal, that as in *McAllister Towing, supra,* the essence of the violation found was based on the timing, since the record revealed that the Employer in the past gave increases in July and in November, while in the year in question, it was given in May a month after the union organizing drive began. The ALJ, affirmed by the Board concluded, in the absence of any explanation for its change from giving its annual increase in the first half of the year, rather than in the second half, the raise was unlawful. Notably, unlike the Respondent here, the raise given in 2000 (the year in question) of 50 cents an hour, was identical to raises given in the prior years.

Finally, as detailed above, Respondent's unlawful campaign here was not confined to a "tightly confined" period, as were the unfair labor practices committed by the Employer in *Donaldson Bros., supra.* On the contrary the unlawful conduct continued from April through the end of the year of 2002, and encompassed a period, after the election, which as noted above, takes on added significance in assessing the possibility of a free and fair new election.

Finally, I find the ALJ's reference to actual "evidence" of diminished union support, exemplified by the lack of testimony from employees that they changed their mind, to be somewhat mystifying. The ALJ's citations of *Sheraton Hotel,* 312 NLRB 304, 305 (1993) for that proposition is misplaced. The Board in *Sheraton Hotel* did refer to evidence of the dissipation of the union's majority, but the Board did not rely on subjective testimony from employees that they had changed their mind about the Union, that the ALJ in *Donaldson Bros.* felt was significant. Rather, the Board simply relied on the fact the Union had obtained 128 cards, by December 14, 1989, and a little more than a month later, January 25, 1990 received only 60 votes in the election. That type of finding can be made here as well, since the Union obtained 62 valid cards, and garnered only 52 votes in the election, sufficient to dissipate its majority status.

Furthermore, Board decisions assessing the propriety of a bargaining order are not based on subjective testimony of employees as to whether or why they changed their mind, but based on the Board's analysis of the probable effect of the unfair labor practices committed on the holding of free and fair new election.

Therefore, I find that *Donaldson Bros.* does not support the conclusion that a bargaining order is not warranted here. *Hialeah Hospital, supra; High Point Construction, supra;* and *Aqua Cool, supra,* are early distinguishable, since none of these cases contained evidence of any unlawful grants of benefits, much less an across the board increase. Further in *High Point Construction supra;* and *Aqua Cool, supra,* only one "hallmark violation", that of threats to close was found.

Accordingly, based upon the foregoing analysis and precedent I conclude that Respondent engaged in a campaign of persvasive unfair labor practices which included three "hallmark violations", most significantly a large across the board increase.[167] The unfair labor practices affected most if not all of the unit, many of which were committed by high level officials, and some unfair labor practices continued well past the election. I therefore find that the possibility of erasing the effects of Respondent's unfair labor practices is slight, and that

[167] I again emphasize the fact that 2002 was the first time that Respondent granted a totally across the board increase, without any consideration of merit.

holding a fair election is unlikely. *Electro Voice Inc.,* 320 NLRB 1094, 1096 (1996); *Holly Farms, supra; Overnite Transportation, supra; Parts Depot, supra; Adams Wholesalers, supra; Gerig's Dump Truck, supra; Triec, supra; Color Tech, supra; Anchorage Times, supra; Honolulu Sporting Goods, supra; Tower Records, supra; Raley's, supra; Teledyne, supra; Skaggs's Drugs, supra; NLRB v. WKRG TV, supra.*

XI The Objections

The unfair labor practices that I have found above parallel the objections filed in the representation case, with the exception of the post election grants of benefits. The pre-election unlawful conduct that I have found, including the unlawful wage increase and promotions, coupled with the numerous violations of Section 8(a)(1) of the Act, are more than sufficient to set aside the election. I shall therefore recommend that the election be set aside, and in view of my recommendation that a bargaining order is warranted, I also recommend that the petition be dismissed.

Conclusions of Law

1. Respondent, Evergreen America Corporation is an employer engaged in commerce within meaning of Section 2(2), (6) and (7) of the Act.

2. Local 1964 International Longshoremen's Association AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees, concerning their activities on behalf of the Union or how they intended to vote in an NLRB election, threatening its employees with plant closure, loss of jobs, loss of benefits, or other unspecified reprisals because of their union activities, soliciting grievances from employees, while impliedly promising to remedy such grievances, promising its employees raises, promotions, changes in its grievance procedure, changes in sick leave procedure, or other improvements in their terms and conditions of employment, in order to persuade them to not to support the union, ordering and instructing its employees not to attend union meetings, read union literature and to throw such literature in the garbage, and by creating the impression that the union activities of its employees are under surveillance, Respondent has violated Section 8(a)(1) of the Act.

4. By granting excessive across the board increases to its employees, and excessive amounts of promotions on July 1, 2002, and by granting other benefits such as allowing its employees to make up for 10 minutes of lateness by making up the time at the end of the day, allowing employees flextime schedules, posting job vacancies on its Electronic Bulletin Board, changing its policy of casual dress, permitting employees to use sick days to care for a family member, and to carryover unused sick days to the following year, permitting employees to substitute Good Friday for Martin Luther King day as a paid holiday, changing the age limit for its voluntary separation program, allowing employees to bring spouses or guests to Respondent's year end Holiday party, and distributing a $400.00 gift certificate to all employees in December of 2002, in order to discourage employees from supporting the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices committed by Respondent, described above, are sufficient to make a free and fair election unlikely, and to warrant the imposition of a bargaining order.

6. The unfair labor practices set forth above, are unfair labor practices affecting commerce within the meaning of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and to take certain affirmative action designed to effectuate the Act.

Respondent will be required to bargain on request with the Union, as the exclusive collective bargaining representative in the appropriate unit concerning their terms and conditions of employment, and to embody any understanding reached in a signed contract.

I shall also recommend, in view of the pervasive and serious nature of the unfair labor practices committed by Respondent, a broad cease and desist order. *High Point Construction, supra,* slip op. at 3; *Hickmont Foods,* 242 NLRB 157 (1990).

In view of the fact that a number of employees and supervisors testified during the instant hearing in Mandarin, I shall also recommend that Respondent post notices in both Mandarin and English.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[168]

ORDER

The Respondent, Evergreen America Corp., Morristown and Jersey City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their support for or activities on behalf of Local 1964, International Longshoremen's Association, AFL-CIO, (The Union), or concerning how its employees intend to vote in an NLRB election.

(b) Soliciting grievances from its employees while impliedly promising to remedy such grievances.

(c) Promising its employees raises, promotions, changes in its grievance procedure, changes in sick leave procedures, or other improvements in their terms and conditions of employment, in order to persuade its employees not to support the union.

(d) Threatening its employees with closing of its facilities, loss of jobs, loss of benefits, or other unspecified reprisals, because of their union activities.

(e) Creating the impression that the union activities of its employees are under surveillance.

(f) Ordering or instructing its employees not to attend union meetings, not to read union

[168] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

literature or to throw union literature in the garbage.

(g) Granting wage increases, promotions, allowing employees to make up for 10 minutes of lateness by making up the time at the end of the day, allowing employees flex time schedules, positing job vacancies on its Electronic Bulletin Board, changing policy concerning casual dress, permitting employees to use sick days to care for family members, or to carryover unused sick days from year to year, permitting employees to substitute Good Friday for Martin Luther King day as a paid holiday, changing the age limit for eligibility for its voluntary separation program, allowing employees to bring guests or spouses to its year end Holiday Party, or distributing $400.00 gift certificates to its employees at year end, in order to discourage employees from supporting the Union.

(h) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an agreement is reached embody the understanding in a signed agreement.

> All full-time and regular part-time office clerical employees employed at the Employer's Jersey City, New Jersey office facility, including the following classifications/departments: Documentation (DOC); General Affairs (GAD); Logistics (LOG); Marine (MAR); Projection (PJD); Quality (QMD); Financial, Auditing, Funds and Accounting (SUP-ACT-AUD-FIN-FND); Import/Export Traffic (TFC-EXP-IMP); and also including Logistics employees who work at the Maher Terminal in Jersey City, New Jersey, but excluding all other employees, Port Captains, Assistant Port Captains, Engineers, Confidential and Managerial Employees (M, DM, PSN, JVP, DSVP, DJVP); Sales employees and Sales coordinators (BIZ); Computer Programmers (CPU); Professional employees, Watchmen, Guards and Supervisors as defined in the act.[169]

(b) Within 14 days after service by the Region, post at its facilities in Jersey City and Port Elizabeth, New Jersey copies of the attached notice in English and Mandarin marked "Appendix."[170] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the

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[169] The evidence establishes that since the election, Respondent has moved from Morristown New Jersey, to Jersey City, New Jersey. The appropriate unit agreed upon by Respondent described above has been changed to reflect that move by Respondent.

[170] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED, that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 25, 2005.

_____
Steven Fish
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate our employees concerning their support for or activities on behalf of Local 1964, International Longshoremen's Association, AFL-CIO, (The Union), or concerning how our employees intend to vote in an NLRB election.

WE WILL NOT solicit grievances from our employees while impliedly promising to remedy such grievances.

WE WILL NOT promise our employees raises, promotions, changes in our grievance procedure, changes in our sick leave procedures, or other improvements in their terms and conditions of employment, in order to persuade our employees not to support the union.

WE WILL NOT threaten our employees with closing of our facilities, loss of jobs, loss of benefits, or other unspecified reprisals, because of their union activities.

WE WILL NOT create the impression that the union activities of our employees are under surveillance by us.

WE WILL NOT order or instruct our employees not to attend union meetings, not to read union literature or to throw union literature in the garbage.

WE WILL NOT grant wage increases, or promotions to our employees, allow our employees to make up for 10 minutes of lateness by making up the time at the end of the day, allow our employees flex time schedules, post job vacancies on our Electronic Bulletin Board, change our policy concerning casual dress, permit our employees to use sick days to care for family members, or to carryover unused sick days from year to year, permit our employees to substitute Good Friday for Martin Luther King day as a paid holiday, change the age limit for eligibility for our voluntary separation program, allow our employees to bring guests or spouses to our year end Holiday party, or distribute $400.00 gift certificates to our employees at year end, in order to discourage employees from supporting the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an agreement is reached embody the understanding in a signed agreement.

> All full-time and regular part-time office clerical employees employed at our Jersey City, New Jersey office facility, including the following Classifications/Departments: Documentation (DOC); General Affairs (GAD); Logistics (LOG); Marine (MAR); Projection (PJD); Quality (QMD); Financial, Auditing, Funds and Accounting (SUP-ACT-AUD-FIN-FND); Import/Export Traffic (TFC-EXP-IMP); and also including Logistics employees who work at the Maher Terminal in Jersey City, New Jersey, but excluding all other employees, Port Captains, Assistant Port Captains, Engineers, Confidential and Managerial employees (M, DM, PSN, JVP, DSVP, DJVP); Sales employees and Sales coordinators (BIZ); Computer Programmers (CPU); Professional employees, Watchmen, Guards and Supervisors as defined in the act.

EVERGREEN AMERICA CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110

(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.